INDEX

Opinions and Orders Below 2

Jurisdiction To Review 3

Questions Presented 3, 4

Statutory Provisions Involved 4

Statement of the Case 5

Reasons For Granting the Writ

I. The Order of November 5, 1971, Is A "Final Decision" Within The Meaning Of Title 28 U.S.C. §1291 9

II. The Findings of Fact, and Conclusions Of Law, Which Underlie The Decision That A Condition Of *De Jure* Segregation Exists In The Detroit Public School System, Are Clearly And Patently Erroneous 12

III. A Metropolitan Plan Of Desegregation Is Constitutionally Inappropriate In The Complete Absence Of A Finding Either That The Geographically And Politically Independent Suburban Detroit School Districts Are Themselves Guilty of *De Jure* Segregation Or, Alternatively, That The School District Boundary Lines Were Created And Maintained With The Intent Of Promoting A Dual School System 18

Conclusion 20

CITATIONS

Beech Grove Investment Company v. Civil Rights Commission, 380 Mich 405 (1968) 13

Bradley v. School Board of the City of Richmond, ...F Supp..., (ED Va, Jan. 5, 1972) 19

Brown v. Board of Education of Topeka, 347 US 483 (1954) 13

Brown Shoe Co. v. United States, 370 US 294 (1962) .. 11

Davis v. School District of City of Pontiac, 309 F Supp 734 (ED Mich, 1970), aff'd. 443 F2d 573 (CA 6, 1971) 15

Deal v. Cincinnati Board of Education (Deal I), 369 F2d 55 (CA 6, 1966), cert den 389 US 847 (1967) 14

Deal v. Cincinnati Board of Education (Deal II), 419 F2d 1387, at 1392 (CA 6, 1969), cert den 402 US 962 (1971) 15

Ferguson v. Gies, 82 Mich 358 (1890) 13

Gillespie v. United States Steel Corp., 379 US 148 (1964) 12

Haney v. County Board of Education of Sevier County, 410 F2d 920 (CA 8, 1969) 19

Keyes v. School District No. 1, Denver, Colorado, 445 F2d 990 (1971), cert granted ...US ..., 92 S Ct 707, 30 L Ed 2d 728 (1972) 17

People ex rel Workman v. Board of Education of Detroit, 18 Mich 399 (1869) 13

Swann v. Charlotte-Mecklenburg Board of Education, 402 US 1 (1971) 15

Title 28 U.S.C. §1291 9

IN THE

SUPREME COURT OF THE UNITED STATES

No. .....

WILLIAM G. MILLIKEN, et al.,

Petitioners,

vs.

RONALD BRADLEY, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners pray that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on February 23, 1972. By such judgment, the United States Court of Appeals declined to review certain opinions and orders of the United States District Court for the Eastern District of Michigan, Southern Division, which decided that the School District of the City of Detroit was a *de jure* segregated public school system and directed the petitioners to prepare a "Metropolitan" plan for the integration of the Detroit and suburban-Detroit School Systems.

OPINIONS AND ORDERS BELOW

The opinion of the District Court, entitled "Ruling on Issue of Segregation," was entered on September 27, 1971 and appears in the Appendix hereto, 1a to 27a. The subsequent order of the District Court, dated November 5, 1971, directing the submission of a "metropolitan plan of desegregation" also appears in the Appendix hereto, 29a to 30a. The District Court's subsequent findings of fact and conclusions of law, based upon the "Ruling on Issue of Segregation," which determined that "relief of segregation in the public schools of the City of Detroit cannot be accomplished within the corporate geographical limits of the city," also appears in the Appendix hereto, 37a to 43a, as does the "Ruling on Propriety of Considering a Metropolitan Remedy to Accomplish Desegregation of the Public Schools of the City of Detroit," where the District Court found the power and "is required to consider a metropolitan remedy for desegregation," appearing in the Appendix hereto, 31a to 36a.

The judgment of the United States Court of Appeals for the Sixth Circuit filed February 23, 1972, dismissing the appeal for want of a "final" decision, appears in the Appendix hereto, 44a to 45a.

Opinions of the United States Court of Appeals rendered at prior stages of the present proceeding are reported in 433 F2d 897 and 438 F2d 945.

JURISDICTION TO REVIEW

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on February 23, 1972. This petition for certiorari was filed within 90 days of that date.

The jurisdiction of the Court is invoked under Section 1291 of Title 28, United States Code.

QUESTIONS PRESENTED

I.

Where the United States District Court, after months of hearing testimony and argument, issues a "Ruling on Issue of Segregation," which makes extensive findings of fact and conclusions of law and concludes that *de jure* segregation exists in the Detroit Public School system, and the District Judge thereafter enters an order, dated November 5, 1971, which directs the State officer-defendants in the case to submit "a metropolitan plan of desegregation" to the District Court, and the District Judge, repeatedly referring to his "continuing jurisdiction," thereafter limits the proceedings and proofs to the question of how many geographically and politically independent school districts should be compelled, by order of the Federal Court, to join with the Detroit Public School system so as to achieve, through massive cross-district busing of students, a desirable racial balance in the new Federal Court-created super-school district, is this November 5, 1971 order of the District Court a "final decision" for purposes of seeking judicial review?

The Petitioners contend that the answer is "YES," but the United States Court of Appeals said "NO."

II.

Are the findings of fact and conclusions of law which underlie the decision of *de jure* segregation clearly erroneous?

The Petitioners contend that the answer is "YES," but the United States Court of Appeals refused to answer the question.

III.

Is a metropolitan plan constitutionally inappropriate in the complete absence of a finding either that the geographically and politically independent suburban Detroit school districts are themselves guilty of *de jure* segregation or, alternatively, that the school district boundary lines were created and maintained with the intent of promoting a dual school system?

The Petitioners contend that the answer is "YES," but the United States Court of Appeals refused to answer the question.

STATUTORY PROVISIONS INVOLVED

Section 1291 of Title 28, United States Code, provides:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

STATEMENT OF THE CASE

Plaintiffs commenced this litigation on August 18, 1970, against the Board of Education of the City of Detroit, its members and superintendent of schools, the Governor, Attorney General, State Board of Education and State Superintendent of Public Instruction of the State of Michigan. The State of Michigan was not named as a party Defendant. Plaintiffs challenged, on constitutional grounds, a legislative enactment of the State of Michigan, 1970 PA 48, MCLA 388.171a et seq; MSA 15.2298(1a) et seq, which allegedly delayed and interferred with the implementation of a voluntary plan of partial high school pupil desegregation which had been adopted by the Detroit Board of Education. Plaintiffs further alleged the existence of constitutionally impermissible racially identifiable pattern of faculty and student assignments in the Detroit Public Schools which pattern, they claimed, was the result of official policies and practices of the defendants and their predecessors in office.

At the conclusion of a hearing held upon Plaintiffs' application for preliminary injunctive relief, the District Court denied all relief on the grounds that the existence of racial segregation in the Detroit School District had not yet been established. The court further dismissed the action as to the Governor and the Attorney General. Plaintiffs promptly appealed, on an emergency basis, to the United States Court of Appeals for the Sixth Circuit which declared the impugned statute (which had not been ruled upon below) to be unconstitutional and ordered reinstatement of the Governor and Attorney General as parties. 433 F2d 897.

Upon remand, plaintiffs moved in the District Court for an order requiring immediate implementation of the

voluntary plan of partial desegregation which had been purportedly impeded by the impugned State statute. After receiving additional plans proferred by the Detroit School District defendants and conducting a hearing thereon, the district court entered an order approving an alternate plan which plaintiffs opposed as being constitutionally insufficient. Plaintiffs again claimed an emergency appeal, but the United States Court of Appeals refused to reach the merits of the appeal and remanded the case to the District Court with instructions that the entire case be tried on its merits forthwith. 438 F2d 945.

After a lengthy trial, the District Court, on September 27, 1971, entered its "Ruling on Issue of Segregation." (1a). The court concluded, both as a matter of fact and of law, that the public schools in Detroit are "segregated on a racial basis" (12a), and that both state and local defendants "have committed acts which have been causal factors in the segregated condition..." (20a).

The Court went on to state:

> "Having found a de jure segregated public school system in operation in the City of Detroit, our first step, in considering what judicial steps must be taken...." (26a).

Thereafter, the District Court gave certain oral instructions to the counsel for the State officer-defendants. These instructions were formalized by the Order of November 5, 1971, wherein it was ordered:

> "The Court having entered its findings of facts and conclusions of law on the issue of segregation on September 27, 1971;
>
> "...

"IT IS FURTHER ORDERED that the State defendants submit a metropolitan plan of desegregation within 120 days." (29a - 30a)

Following submission of several plans submitted by various parties, including the defendant State Board of Education, the Court, on March 24, 1972 proceeded to consider whether school district lines should be revised or ignored to combine city and suburban school populations in a way to achieve integration on a metropolitan basis. Brushing aside the arguments of the State officer-defendants, the Court held that any further discussion of the question of the existence of *de jure* segregation had been finally foreclosed by the "Ruling on Issue of Segregation".

"The State defendants in this case take the position, as we understand it, that no 'state action' has had a part in the segregation found to exist. This assertion disregards the findings already made by this court, and the decision of the Court of Appeals as well.... (33a).

"...

"The schedule previously established for the hearing on metropolitan plans will go forward as noticed, beginning March 28, 1972." (36a).

Thereafter, on March 28, 1972, the Court issued its "Findings of Fact and Conclusions of Law on Detroit-Only Plans of Desegregation." Specifically incorporating its September-filed "Ruling on Issue of Segregation," the Court found :

"...

"1. The court has continuing jurisdiction of this action for all purposes, including the granting of effective relief. See Ruling on Issue of Segregation, September 27, 1971." (40a).

"2. On the basis of the court's finding of illegal school segregation, the obligation of the school defendants is to adopt and implement an educationally sound, practicable plan of desegregation that promises realistically to achieve now and hereafter the greatest possible degree of actual school desegregation...." (40a).

"...

"That the court must look beyond the limits of the Detroit school district for a solution to the problem of segregation in the Detroit public schools is obvious...." (42a).

Proceedings in the District Court are still continuing as of the date of the filing of this petition.

The State officer-defendants requested review of the District Court's Order of November 5, 1971, in the United States Court of Appeals for the Sixth Circuit, by the filing of a claim of appeal on December 3, 1971. On Motion of the plaintiffs, the Court of Appeals, on February 23, 1972, dismissed the appeal. (44a).

REASONS FOR GRANTING THE WRIT

I.

The Order Of November 5, 1971, Is A "Final Decision" Within The Meaning Of Title 28 U.S.C. §1291.

Section 1291 of Title 28 provides that the Federal courts of appeals "shall" have jurisdiction of appeals from "all final decisions of the district courts."

On scrutiny of even the limited record appended hereto as an appendix, it indisputably appears that:

(1) The District Court has found that "both the State of Michigan and the Detroit Board of Education have committed acts which have been causal factors in the segregated condition of the public schools of the City of Detroit." (20a)

(2) The District Court conclusively determined that "the circumstances of the case require judicial intervention and equitable relief...." (27a). As the Court stated it: "a right and a violation have been shown." (31a).

(3) The District Court, relying upon this ruling, has refused to hear any more proofs or argument relating to the question of whether there was, in fact, any state action as a predicate for the segregated condition of the Detroit Public Schools. (33a).

(4) The District Court, by way of equitable relief, has rejected all available remedies other than revising or ignoring school district boundary lines so as to combine the historically and geographically independent city and sub-

urban school populations in a way to achieve integration on a metropolitan basis. (42a).

Thus, the special and unusual circumstances here presented are that the District Court, as a matter of "continuing jurisdiction (40a), is now conducting the separate and distinct remedy phase of the trial, a phase *limited* solely to the question of *how many* legally separate school districts should be lumped together, by order of the Federal District Court, to the new Federal court-created super school district of the metropolitan Detroit area.

While that remedy phase of the matter is being litigated, the State officer-defendants here seek judicial review of the initial phase. We seek access to a forum so that we may question whether the finding of a "violation" is clearly erroneous.

No practical difficulty is thereby presented. The transcript of testimony on the initial phase of the District Court proceeding is already prepared. The appeal on the initial phase can proceed without any conflict with the continuing proceeding on the remedy phase now before the District Court.

Indeed, the practicalities of the situation mandate review without further delay. The Court of Appeals, and ultimately this Court, should review this matter before hundreds of thousands of children are loaded onto school buses to attend school long distances from home and the educational programs, financing and the entire operation of scores of school districts are disrupted. The next school year begins in September. The District Judge has, as yet, given no indication of when he will announce which plan the Court is adopting or what the effective date of

the plan will be, thereby leaving open the distinct possibility that appellate review may not be completed prior to the effective date of the plan, unless review commences now.

The correctness of the decision below, finding a lack of finality, is open to serious question. The refusal of the Sixth Circuit to permit an appeal on this record cannot be justified in light of the rule plainly adopted by this Court in *Brown Shoe Co.* v. *United States,* 370 US 294, at 306-309 (1962).

In *Brown,* the question was whether an order for divestiture in a Clayton Anti-Trust Act (Title 15 U.S.C. §25) prosecution was "final" where the single provision of the judgment by which its finality might be questioned was one requiring the appellant there to propose a plan for effectuating the trial court's order or divestiture. The Court found the requisite finality.

In *Brown,* the propriety of divestiture was considered in the trial court and was disputed before this Court on an "all or nothing" basis. (370 US at 309). Here, the question of the existence of *de jure* segregation was fully considered below. Here, we dispute the ruling of *de jure* segregation in the Detroit Public Schools and the later holding that a metropolitan remedy, necessarily involving massive cross-district busing, is constitutionally required, on the same "all or nothing" basis.

Repetitive judicial consideration of the same question will not occur here any more than it did in *Brown.* The issue here, like the issue in *Brown,* is ripe for review in the here and now, and may, thereafter, be foreclosed.

It is axiomatic under our jurisprudential experience that for purposes of appellate review a decision "final"

within the meaning of Title 28 U.S.C. §1291 "does not necessarily mean the last order possible to be made in a case." *Gillespie* v. *United States Steel Corp.*, 379 US 148, at 152 (1964).

The delay in withholding review of the issue until the full details of a busing plan have been approved by the District Court is clearly and profoundly inimical to the public interest. The unsettling influence of uncertainty as to the affirmance of the initial, underlying decision of *de jure* segregation, which will compel massive cross-district busing, would only make still more difficult the task of operating a system of free public schools.

There are issues for the here and now. The order in question is at least within the twilight zone of finality. A Detroit-only plan, if constitutionally required, could involve 300,000 children. A metropolitan plan for the Detroit and suburban school districts could involve 86 separate school districts and 1,000,000 children. Both plans involve massive busing of school children. The public interest here mandates a practical rather than a technical construction of the right of access to Federal appellate review.

II.

The Findings Of Fact, And Conclusions Of Law, Which Underlie The Decision That De Jure **Segregation Exists In The Detroit Public School System, Are Clearly And Patently Erroneous.**

In the event that this petition is granted, the State officer-defendants believe that they can demonstrate through thorough analysis of the testimony and exhibits, that the findings of fact made below — insofar as they

seem to support a finding of *de jure* segregation — are clearly erroneous, F.R.C.P. 52(a). The conclusions of law are also patently in error.

It was not until 1954 that this Court reconsidered and rejected the "separate but equal" doctrine. *Brown* v. *Board of Education of Topeka,* 347 US 483 (1954). The Supreme Court of the State of Michigan had, however, some 64 years prior to this Court's decision in *Brown* rejected the "separate but equal" doctrine as violating *State* law. *Ferguson* v. *Gies,* 82 Mich 358 (1890). By Act 130 of the Public Acts of 1885, the Michigan legislature made it a criminal offense for any person to deny equal treatment to any other person, for reasons based on race, in any place of public accommodation within this State. In the one reported case where a school district sought to segregate by regulation, its actions were promptly nullified by the legislature and the Michigan Supreme Court. *People ex rel Workman* v. *Board of Education of Detroit,* 18 Mich 399 (1869). The State of Michigan does not now have, nor has the State ever countenanced, a "dual school system." *Racial segregation in public education was declared to be a violation of the public policy of the State of Michigan in 1867,* nearly a century in advance of this Court's decision in *Brown.* See review of public policy of State of Michigan in *Beech Grove Investment Company* v. *Civil Rights Commission,* 380 Mich 405, at 434-435 (1968).

The District Court, in its "Ruling on Issue of Segregation," stated the following:

> "... The principal causes undeniably have been population movement and housing patterns, but state and local governmental actions, including school board actions, have played a substantial role in promoting segregation. It is, the Court believes, unfortunate that

> we cannot deal with public school segregation on a no-fault basis, for if racial segregation in our public schools is an evil, *then it should make no difference whether we classify it de jure or de facto* . . . ." [Emphasis supplied] (20a)

Primarily, the evidence upon which the District Court relied concerned segregated patterns in housing. None of the defendants has any constitutional or statutory power over housing. Much of this evidence attempted to show that the *Federal* government, principally through its public housing, VA and FHA mortgage insurance programs, had been a willing partner with *private* individuals and firms in the creation and perpetuation of racially segregated neighborhoods, even to the point of insisting upon them. Appendix 9a. In admitting such evidence, over continuing objections of defendants, the District Court ignored the clear and binding commands of the Court of Appeals for the Sixth Circuit.

The Sixth Circuit — prior to deciding not to decide *this* case — had quite wisely held that evidence of alleged discrimination in the public and private housing markets should be *excluded* from the trial of this type of case. The Sixth Circuit reasoned quite correctly that such discrimination is caused, if in fact it does exist, by persons other than the school officials. It is a situation the Sixth Circuit reasoned, over which educational officials may have no power. We emphasize here that none of the defendants has any power over housing. Therefore, the Sixth Circuit concluded, appropriate relief is available as against those who infringed upon rights in housing in a civil action with those wrong-doers as defendants, rather than in a school case with school officials as defendants. *Deal* v. *Cincinnati Board of Education* (Deal I), 369 F2d 55, at 60-61 (CA 6, 1966), cert den 389 US 847. This ruling was restated

with vigor in *Deal* v. *Cincinnati Board of Education* (Deal II), 419 F2d 1387, at 1392 (CA 6, 1969), cert den 402 US 962.

The concept has also been stated in *Davis* v. *School District of Pontiac,* 309 F Supp 734 (ED Mich, 1970), aff'd 443 F2d 573 (CA 6, 1971) and *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 US 1, at 22-23, (1971), where this Court said:

> "The constant theme and thrust of every holding from *Brown I* to date is that state-enforced separation of races in public schools is discrimination that violates the Equal Protection Clause. The remedy commanded was to dismantle dual school systems.
>
> "We are concerned in these cases with the elimination of the discrimination inherent in the dual school systems, not with myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds. The target of the cases from *Brown I* to the present was the dual school system. The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. One vehicle can carry only a limited amount of baggage. It would not serve the important objective of *Brown I* to seek to use school desegregation cases for purposes beyond their scope, although desegregation of schools ultimately will have impact on other forms of discrimination. We do not reach in this case the question whether a showing that school segregation is a consequence of other types of state action, without any discriminatory action by the school authorities, is a constitutional violation requiring remedial action by

a school desegregation decree. This case does not present that question and we therefore do not decide it.

"Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools."

The District Court, in its decision on *de jure* segregation found ". . . that both the State of Michigan and the Detroit Board of Education have committed acts which have been causal factors in the segregated condition of the public schools of the City of Detroit . . ." (20a). It must be emphasized that the State of Michigan is not a party defendant herein. There is no recognized principle in our jurisprudence under which a suit against certain state officers may be used as a launching pad for findings against the state itself.

Aside from evidence relating to housing patterns, the record contains no evidence of a pattern or scheme, but rather evidence which at best shows only a few random and isolated incidents. Thus, for example, one finding of fact relates to an isolated incident in which a lowly functionary of the local school board had authorized the busing of a small number of black students past a white school to attend a newer school in a black neighborhood. (11a). This incident was isolated in scope to a few students during a relatively short period of time. The record shows that the problem was promptly corrected as soon as it was brought to the attention of policy-making officials.

The District Court ruled, based on 30 specific findings, that there was no *de jure* segregation of faculty in the Detroit public schools. Yet, the District Court concluded that the *same defendants* were guilty of *de jure* segregation as to the assignment of pupils. (15a).

The District Court's findings concerning *de jure* segregation in school attendance patterns were, in large part, of the most general nature. In *Keyes* v *School District No. 1, Denver, Colorado,* 445 F2d 990, 1002-1007 (1971), Cert grant, ... US ..... (1972), 30 L Ed 2d 728 (1972), the Tenth Circuit Court affirmed findings of *de jure* segregation as to *specific* schools, but no others, *and ordered a remedy only in those* **specific** *schools where* **de jure** *segregation existed.* Herein, the District Court made broad findings of *de jure* segregation as to pupil attendance and, on that basis, jumped to a metropolitan remedy *without considering specific schools* in making its findings.

This appeal, therefore, affords an excellent vehicle for a determination by this Court as to whether as a matter of law a condition of *de jure* segregation may be said to exist where the evidence shows little more than a few unrelated incidents, isolated as to scope and duration, involving local officials, and no wrongdoing by the State officer-defendants, but some possible wrong-doing in the area of housing by agencies of the Federal government and by private individuals.

If *de jure* segregation can be said to exist on this record, then it appears that there is no longer any valid distinction to be made between *de jure* and *de facto* segregation. (20a). And, if that is so, this Court should clearly so state.

III.

A Metropolitan Plan Of Desegregation Is Constitutionally Inappropriate In The Complete Absence Of A Finding Either That The Geographically And Politically Independent Surburban Detroit School Districts Are Themselves Guilty Of De Jure Segregation Or, Alternatively, That The School District Boundary Lines Were Created And Maintained With The Intent Of Promoting A Dual School System.

This is not ordinary, run-of-the-mill litigation. The case poses—if this Court chooses to acknowledge and reach it—a significant aspect of a wide, growing and disturbing problem.

The District Judge in this case first, in substance, abolished the distinction between segregation *de facto* and segregation *de jure*. (Reason No. II, supra.)

Then, the District Judge proceeded to decide (1) that busing was the only adequate remedy available, (2) that a Detroit-only busing plan was inadequate, (3) and, therefore, that a metropolitan plan was the only possible remedy in this case. (35a; 41a; 42a).

Having so decided, the District Judge then commenced a new phase of the case limited to the question of how many of the 700,000 or so children in the 86 independent suburban Detroit school districts should be included in his metropolitan plan.

Busing is, of course, an available instrument to provide a better educational opportunity to children in substandard or *de jure* segregated schools. For such children, an im-

perfect answer today may prove to be far more valuable than a more perfect answer tomorrow. For a child, tomorrow may be too late. Busing must, however, be recognized for what it is, an imperfect and temporary tool, a crutch and not a cure.

As far as we know, neither this Court nor any Court of Appeals has ever approved the use of busing on the scale here contemplated. While a few decisions do speak of "piercing the veil" where a system of *de jure* segregation is perpetuated by carefully gerrymandered school district lines, no decision has ever approved the lumping of politically and geographically independent suburban school districts into an urban busing plan simply because they happen to be there.[1]

No finding of the District Court indicates the existence of *de jure* segregation in the suburban school districts. Likewise, no finding of the District Court indicates that these school district lines were drawn for any improper purpose or by any improper method.

Then, there is the whole question of the jurisdiction, i.e., the power, of the Federal District Court to adopt a metropolitan plan without a specific finding of *de jure* segregation as to the included suburban school districts.

If the true basis of the District Court's action rests upon an implicit finding that the schools in Detroit are substandard, can the Judge without any further ado simply order children bused into these schools from the suburbs? Is not the answer to this problem in the area of school

---

[1] Compare *Haney* v *County Board of Sevier County*, 410 F2d 920 (CA 8, 1969) and *Bradley* v *School Board of the City of Richmond*, ——— F Supp ——— (ED Va, dec. Jan. 5, 1972), where the Court found a state-wide policy of *de jure* segregation in the schools.

finance and construction rather than massive cross-district busing?

Can the District Court alter local control of schools by creating a super school district that might well thereafter constitute the largest school district in the United States?

Even assuming that busing is an appropriate instrument for dealing with the problem of the children attending the Detroit School System, this case poses the important and difficult question of whether a metropolitan plan of busing may ever be used by a Federal court in the total absence of any finding of a metropolitan-wide *de jure* policy of segregation.

CONCLUSION

For the aforegoing reasons, a write of certiorari should issue to review the judgment of the Sixth Circuit.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

ROBERT A. DERENGOSKI
Solicitor General

EUGENE KRASICKY
Assistant Attorney General

STEWART H. FREEMAN
Assistant Solicitor General
Counsel for Petitioners

The Seven Story Office Building
525 W. Ottawa Street
Lansing, Michigan 48913

Dated: May 5, 1972

APPENDIX

Index to Appendix

Page

United States District Court, Eastern District of Michigan, Southern Division:

Ruling on Issue of Segregation 1a

Order of November 5, 1971 ..... 29a

Ruling On Propriety of Considering A Metropolitan Remedy To Accomplish Desegregation Of The Public Schools Of The City of Detroit 31a

Findings Of Fact And Conclusions Of Law On Detroit-Only Plans Of Desegregation 37a

United States Court of Appeals For The Sixth Circuit:

Order Of The United States Court Of Appeals For the Sixth Circuit 44a

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RONALD BRADLEY, et al., Plaintiffs, v. WILLIAM G. MILLIKEN, et al., Defendants, DETROIT FEDERATION OF TEACHERS, LOCAL No. 231, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, Defendant-Intervenor, and DENISE MAGDOWSKI, et al., Defendants-Intervenor	CIVIL ACTION NO. 35257

RULING ON ISSUE OF SEGREGATION

This action was commenced August 18, 1970, by plaintiffs, the Detroit Branch of the National Association for the Advancement of Colored People* and individual parents and students, on behalf of a class later defined by order of the Court dated February 16, 1971, to include "all school children of the city of Detroit and all Detroit resident parents who have children of school age." Defendants are the Board of Education of the City of Detroit, its members and its former superintendent of schools, Dr. Norman A.

* The standing of the NAACP as a proper party plaintiff was not contested by the original defendants and the Court expresses no opinion on the matter.

Drachler, the Governor, Attorney General, State Board of Education and State Superintendent of Public Instruction of the State of Michigan. In their complaint, plaintiffs attacked a statute of the State of Michigan known as Act 48 of the 1970 Legislature on the ground that it put the State of Michigan in the position of unconstitutionally interfering with the execution and operation of a voluntary plan of partial high school desegregation (known as the April 7, 1970 Plan) which had been adopted by the Detroit Board of Education to be effective beginning with the fall 1970 semester. Plaintiffs also alleged that the Detroit Public School System was and is segregated on the basis of race as a result of the official policies and actions of the defendants and their predecessors in office.

Additional parties have intervened in the litigation since it was commenced. The Detroit Federation of Teachers (DFT) which represents a majority of Detroit Public School teachers in collective bargaining negotiations with the defendant Board of Education, has intervened as a dedefendant, and a group of parents has intervened as defendants.

Initially the matter was tried on plaintiffs' motion for preliminary injunction to restrain the enforcement of Act 48 so as to permit the April 7 Plan to be implemented. On that issue, this Court ruled that plaintiffs were not entitled to a preliminary injunction since there had been no proof that Detroit has a segregated school system. The Court of Appeals found that the "implementation of the April 7 Plan was thwarted by State action in the form of the Act of the Legislature of Michigan," (433 F.2d 897, 902), and that such action could not be interposed to delay, obstruct or nullify steps lawfully taken for the purpose of protecting rights guaranteed by the Fourteenth Amendment.

The plaintiffs then sought to have this Court direct the defendant Detroit Board to implement the April 7 Plan by the start of the second semester (February, 1971) in order to remedy the deprivation of constitutional rights wrought by the unconstitutional statute. In response to an order of the Court, defendant Board suggested two other plans, along with the April 7 Plan, and noted priorities, with top priority assigned to the so-called "Magnet Plan." The Court acceded to the wishes of the Board and approved the Magnet Plan. Again, plaintiffs appealed but the appellate court refused to pass on the merits of the plan. Instead, the case was remanded with instructions to proceed immediately to a trial on the merits of plaintiffs' substantive allegations about the Detroit School System. 438 F.2d 945 (6th Cir. 1971).

Trial, limited to the issue of segregation, began April 6, 1971 and concluded on July 22, 1971, consuming 41 trial days, interspersed by several brief recesses necessitated by other demands upon the time of Court and counsel. Plaintiffs introduced substantial evidence in support of their contentions, including expert and factual testimony, demonstrative exhibits and school board documents. At the close of plaintiffs' case, in chief, the Court ruled that they had presented a prima facie case of state imposed segregation in the Detroit Public Schools; accordingly, the Court enjoined (with certain exceptions) all further school construction in Detroit pending the outcome of the litigation.

The State defendants urged motions to dismiss as to them. These were denied by the Court.

At the close of proofs intervening parent defendants (Denise Magdowski, et al.) filed a motion to join, as parties 85 contiguous "suburban" school districts—all within the so-called Larger Detroit Metropolitan area. This

motion was taken under advisement pending the determination of the issue of segregation.

It should be noted that, in accordance with earlier rulings of the Court, proofs submitted at previous hearings in the cause, were to be and are considered as part of the proofs of the hearing on the merits.

In considering the present racial complexion of the City of Detroit and its public school system we must first look to the past and view in perspective what has happened in the last half century. In 1920 Detroit was predominantly white city—91%—and its population younger than in more recent times. By the year 1960 the largest segment of the city's white population was in the age range of 35 to 50 years, while its black population was younger and of childbearing age. The population of 0-15 years of age constituted 30% of the total population of which 60% were white and 40% were black. In 1970 the white population was principally aging—45 years—while the black population was younger and of childbearing age. Childbearing blacks equaled or exceeded the total white population. As older white families without children of school age leave the city they are replaced by younger black families with school age children, resulting in a doubling of enrollment in the local neighborhood school and a complete change in student population from white to black. As black inner city residents move out of the core city they "leap-frog" the residential areas nearest their former homes and move to areas recently occupied by whites.

The population of the City of Detroit reached its highest point in 1950 and has been declining by approximately 169,500 per decade since then. In 1950, the city population constituted 61% of the total population of the standard

metropolitan area and in 1970 it was but 36% of the metropolitan area population. The suburban population has increased by 1,978,000 since 1940. There has been a steady out-migration of the Detroit population since 1940. Detroit today is principally a conglomerate of poor black and white plus the aged. Of the aged, 80% are white.

If the population trends evidenced in the federal decennial census for the years 1940 through 1970 continue, the total black population in the City of Detroit in 1980 will be approximately 840,000, or 53.6% of the total. The total population of the city in 1970 is 1,511,000 and, if past trends continue, will be 1,338,000 in 1980. In school year 1960-61, there were 285,512 students in the Detroit Public Schools of which 130,765 were black. In school year 1966-67, there were 297,035 students, of which 168,299 were black. In school year 1970-71 there were 289,743 students of which 184,194 were black. The percentage of black students in the Detroit Public Schools in 1975-76 will be 72.0%, in 1980-81 will be 80.7% and in 1992 it will be virtually 100% if the present trends continue. In 1960, the non-white population, ages 0 years to 19 years, was as follows:

0— 4 years	42%
5— 9 years	36%
10—14 years	28%
15—19 years	18%

In 1970 the non-white population, ages 0 years to 19 years, was as follows:

0— 4 years	48%
5— 9 years	50%
10—14 years	50%
15—19 years	40%

The black population as a percentage of the total population in the City of Detroit was:

(a)	1900	1.4%
(b)	1910	1.2%
(c)	1920	4.1%
(d)	1930	7.7%
(e)	1940	9.2%
(f)	1950	16.2%
(g)	1960	28.9%
(h)	1970	43.9%

The black population as a percentage of total student population of the Detroit Public Schools was as follows:

(a)	1961	45.8%
(b)	1963	51.3%
(c)	1964	53.0%
(d)	1965	54.8%
(e)	1966	56.7%
(f)	1967	58.2%
(g)	1968	59.4%
(h)	1969	61.5%
(i)	1970	63.8%

For the years indicated the housing characteristics in the City of Detroit were as follows:

(a)	1960	total supply of housing units was 553,000
(b)	1970	total supply of housing units was 530,770

The percentage decline in the white students in the Detroit Public Schools during the period 1961-1970 (53.6% in 1960; 34.8% in 1970) has been greater than the percentage decline in the white population in the City of

Detroit during the same period (70.8% in 1960; 55.21% in 1970), and correlatively, the percentage increase in black students in the Detroit Public Schools during the nine-year period 1961-1970 (45.8% in 1961; 63.8% in 1970) has been greater than the percentage increase in the black population of the City of Detroit during the ten-year period 1960-1970 (28.9% in 1960; 43.9% in 1970). In 1961 there were eight schools in the system without white pupils and 73 schools with no Negro pupils. In 1970 there were 30 schools with no white pupils and 11 schools with no Negro pupils, an increase in the number of schools without white pupils of 22 and a decrease in the number of schools without Negro pupils of 62 in this ten-year period. Between 1968 and 1970 Detroit experienced the largest increase in percentage of black students in the student population of any major northern school district. The percentage increase in Detroit was 4.7% as contrasted with—

New York	2.0%
Los Angeles	1.5%
Chicago	1.9%
Philadelphia	1.7%
Cleveland	1.7%
Milwaukee	2.6%
St. Louis	2.6%
Columbus	1.4%
Indianapolis	2.6%
Denver	1.1%
Boston	3.2%
San Francisco	1.5%
Seattle	2.4%

In 1960, there were 266 schools in the Detroit School system. In 1970, there were 319 schools in the Detroit School system.

In the Western, Northwestern, Northern, Murray, Northeastern, Kettering, King and Southeastern high school service areas, the following conditions exist at a level significantly higher than the city average:

(a) Poverty in children

(b) Family income below poverty level

(c) Rate of homicides per population

(d) Number of households headed by females

(e) Infant mortality rate

(f) Surviving infants with neurological defects

(g) Tuberculosis cases per 1,000 population

(h) High pupil turnover in schools

The City of Detroit is a community generally divided by racial lines. Residential segregation within the city and throughout the larger metropolitan area is substantial, pervasive and of long standing. Black citizens are located in separate and distinct areas within the city and are not generally to be found in the suburbs. While the racially unrestricted choice of black persons and economic factors may have played some part in the development of this pattern of residential segregation, it is, in the main, the result of past and present practices and customs of racial discrimination, both public and private, which have and do restrict the housing opportunities of black people. On the record there can be no other finding.

Governmental actions and inaction at all levels, federal, state and local, have combined, with those of private organizations, such as loaning institutions and real estate associations and brokerage firms, to establish and to

maintain the pattern of residential segregation throughout the Detroit metropolitan area. It is no answer to say that restricted practices grew gradually (as the black population in the area increased between 1920 and 1970), or that since 1948 racial restrictions on the ownership of real property have been removed. The policies pursued by both government and private persons and agencies have a continuing and present effect upon the complexion of the community—as we know, the choice of a residence is a relatively infrequent affair. For many years FHA and VA openly advised and advocated the maintenance of "harmonious" neighborhoods, *i.e.*, racially and economically harmonious. The conditions created continue. While it would be unfair to charge the present defendants with what other governmental officers of agencies have done, it can be said that the actions or the failure to act by the responsible school authorities, both city and state, were linked to that of these other governmental units. When we speak of governmental action we should not view the different agencies as a collection of unrelated units. Perhaps the most that can be said is that all of them, including the school authorities, are, in part, responsible for the segregated condition which exists. And we note that just as there is an interaction between residential patterns and the racial composition of the schools, so there is a corresponding effect on the residential pattern by the racial composition of the schools.

Turning now to the specific and pertinent (for our purposes) history of the Detroit school system so far as it involves both the local school authorities and the state school authorities, we find the following:

During the decade beginning in 1950 the Board created and maintained optional attendance zones in neighborhoods undergoing racial transition and between high school at-

tendance areas of opposite predominant racial compositions. In 1959 there were eight basic optional attendance areas affecting 21 schools. Optional attendance areas provided pupils living within certain elementary areas a choice of attendance at one of two high schools. In addition there was at least one optional area either created or existing in 1960 between two junior high schools of opposite predominant racial components. All of the high school optional areas, except two, were in neighborhoods undergoing racial transition (from white to black) during the 1950s. The two exceptions were: (1) the option between Southwestern (61.6% black in 1960) and Western (15.3% black); (2) the option between Denby (0% black) and Southeastern (30.9% black). With the exception of the Denby-Southeastern option (just noted) all of the options were between high schools of opposite predominant racial compositions. The Southwestern-Western and Denby-Southeastern optional areas are all white on the 1950, 1960 and 1970 census maps. Both Southwestern and Southeastern, however, had substantial white pupil populations, and the option allowed whites to escape integration. The natural, probable, foreseeable and actual effect of these optional zones was to allow white youngsters to escape identifiably "black" schools. There had also been an optional zone (eliminated between 1956 and 1959) created in "an attempt . . . to separate Jews and Gentiles within the system," the effect of which was that Jewish youngsters went to Mumford High School and Gentile youngsters went to Cooley. Although many of these optional areas had served their purpose by 1960 due to the fact that most of the areas had become predominantly black, one optional area (Southwestern-Western affecting Wilson Junior High graduates) continued until the present school year (and will continue to effect 11th and 12th grade white youngsters who elected to escape from predominantly black Southwestern to predominantly white Western High

School). Mr. Henrickson, the Board's general fact witness, who was employed in 1959 to, *inter alia*, eliminate optional areas, noted in 1967 that: "In operation Western appears to be still the school to which white students escape from predominantly Negro surrounding schools." The effect of eliminating this optional area (which affected only 10th graders for the 1970-71 school year) was to decrease Southwestern from 86.7% black in 1969 to 74.3% black in 1970.

The Board, in the operation of its transportation to relieve overcrowding policy, has admittedly bused black pupils past or away from closer white schools with available space to black schools. This practice has continued in several instances in recent years despite the Board's avowed policy, adopted in 1967, to utilize transportation to increase integration.

With one exception (necessitated by the burning of a white school), defendant Board has never bused white children to predominantly black schools. The Board has not bused white pupils to black schools despite the enormous amount of space available in inner-city schools. There were 22,961 vacant seats in schools 90% or more black.

The Board has created and altered attendance zones, maintained and altered grade structures and created and altered feeder school patterns in a manner which has had the natural, probable and actual effect of continuing black and white pupils in racially segregated schools. The Board admits at least one instance where it purposefully and intentionally built and maintained a school and its attendance zone to contain black students. Throughout the last decade (and presently) school attendance zones of opposite racial compositions have been separated by north-south boundary lines, despite the Board's awareness (since at least 1962) that drawing boundary lines in an east-west direction would result in significant integration. The

natural and actual effect of these acts and failures to act has been the creation and perpetuation of school segregation. There has never been a feeder pattern or zoning change which placed a predominantly white residential area into a predominantly black school zone or feeder pattern. Every school which was 90% or more black in 1960, and which is still in use today, remains 90% or more black. Whereas 65.8% of Detroit's black students attended 90% or more black schools in 1960, 74.9% of the black students attended 90% or more black schools during the 1970-71 school year.

The public schools operated by defendant Board are thus segregated on a racial basis. This racial segregation is in part the result of the discriminatory acts and omissions of defendant Board.

In 1966 the defendant State Board of Education and Michigan Civil Rights Commission issued a Joint Policy Statement on Equality of Educational Opportunity, requiring that

> "Local school boards must consider the factor of racial balance along with other educational considerations in making decisions about selection of new school sites, expansion of present facilities .... Each of these situations presents an opportunity for integration."

Defendant State Board's "School Plant Planning Handbook" requires that

> "Care in site location must be taken if a serious transportation problem exists or if housing patterns in an area would result in a school largely segregated on racial, ethnic, or socio-economic lines."

The defendant City Board has paid little heed to these statements and guidelines. The State defendants have similarly failed to take any action to effectuate these policies. Exhibit NN reflects construction (new or additional) at 14 schools which opened for use in 1970-71; of these 14 schools, 11 opened over 90% black and one opened less than 10% black. School construction costing $9,222,000 is opening at Northwestern High School which is 99.9% black, and new construction opens at Brooks Junior High, which is 1.5% black, at a cost of $2,500,000. The construction at Brooks Junior High plays a dual segregatory role: not only is the construction segregated, it will result in a feeder pattern change which will remove the last majority white school from the already almost all-black Mackenzie High School attendance area.

Since 1959 the Board has constructed at least 13 small primary schools with capacities of from 300 to 400 pupils. This practice negates opportunities to integrate, "contains" the black population and perpetuates and compounds school segregation.

The State and its agencies, in addition to their general responsibility for and supervision of public education, have acted directly to control and maintain the pattern of segregation in the Detroit schools. The State refused, until this session of the legislature, to provide authorization or funds for the transportation of pupils within Detroit regardless of their poverty or distance from the school to which they were assigned, while providing in many neighboring, mostly white, suburban districts the full range of state supported transportation. This and other financial limitations, such as those on bonding and the working of the state aid formula whereby suburban districts were able to make far larger per pupil expenditures despite less tax effort, have created and perpetuated systematic educational inequalities.

The State, exercising what Michigan courts have held to be is "plenary power" which includes power "to use a statutory scheme, to create, alter, reorganize or even dissolve a school district, despite any desire of the school district, its board, or the inhabitants thereof," acted to reorganize the school district of the City of Detroit.

The State acted through Act 48 to impede, delay and minimize racial integration in Detroit schools. The first sentence of Sec. 12 of the Act was directly related to the April 7, 1970 desegregation plan. The remainder of the section sought to prescribe for each school in the eight districts criterion of "free choice" (open enrollment) and "neighborhood schools" ("nearest school priority acceptance"), which had as their purpose and effect the maintenance of segregation.

In view of our findings of fact already noted we think it unnecessary to parse in detail the activities of the local board and the state authorities in the area of school construction and the furnishing of school facilities. It is our conclusion that these activities were in keeping, generally, with the discriminatory practices which advanced or perpetuated racial segregation in these schools.

It would be unfair for us not to recognize the many fine steps the board has taken to advance the cause of quality education for all in terms of racial integration and human relations. The most obvious of these is in the field of faculty integration.

Plaintiffs urge the Court to consider allegedly discriminatory practices of the Board with respect to the hiring, assignment and transfer of teachers and school administrators during a period reaching back more than 15 years. The short answer to that must be that black teachers and school

administrative personnel were not readily available in that period. The Board and the intervening defendant union have followed a most advanced and exemplary course in adopting and carrying out what is called the "balanced staff concept"—which seeks to balance faculties in each school with respect to race, sex and experience, with primary emphasis on race. More particularly, we find:

1. With the exception of affirmative policies designed to achieve racial balance in instructional staff, no teacher in the Detroit Public Schools is hired, promoted or assigned to any school by reason of his race.

2. In 1956, the Detroit Board of Education adopted the rules and regulations of the Fair Employment Practices Act as its hiring and promotion policy and has adhered to this policy to date.

3. The Board has actively and affirmatively sought out and hired minority employees, particularly teachers and administrators, during the past decade.

4. Between 1960 and 1970, the Detroit Board of Education has increased black representation among its teachers from 23.3% to 42.1%, and among its administrators from 4.5% to 37.8%.

5. Detroit has a higher proportion of black administrators than any other city in the country.

6. Detroit ranked second to Cleveland in 1968 among the 20 largest northern city school districts in the percentage of blacks among the teaching faculty and in 1970 surpassed Cleveland by several percentage points.

7. The Detroit Board of Education currently employs black teachers in a greater percentage than the percentage of adult black persons in the City of Detroit.

8. Since 1967, more blacks than whites have been placed in high administrative posts with the Detroit Board of Education.

9. The allegation that the Board assigns black teachers to black schools is not supported by the record.

10. Teacher transfers are not granted in the Detroit Public Schools unless they conform with the balanced staff concept.

11. Between 1960 and 1970, the Detroit Board of Education reduced the percentage of schools without black faculty from 36.3% to 1.2%, and of the four schools currently without black faculty, three are specialized trade schools where minority faculty cannot easily be secured.

12. In 1968, of the 20 largest northern city school districts, Detroit ranked fourth in the percentage of schools having one or more black teachers and third in the percentage of schools having three or more black teachers.

13. In 1970, the Board held open 240 positions in schools with less than 25% black, rejecting white applicants for these positions until qualified black applicants could be found and assigned.

14. In recent years, the Board has come under pressure from large segments of the black community to assign male black administrators to predominantly black schools to serve as male role models for students, but such assignments have been made only where consistent with the balanced staff concept.

15. The numbers and percentages of black teachers in Detroit increased from 2,275 and 21.6%, respectively, in

February, 1961, to 5,106 and 41.6%, respectively, in October, 1970.

16. The number of schools by percent black of staffs changed from October, 1963 to October, 1970 as follows:

Number of schools without black teachers—decreased from 41, to 4.

Number of schools with more than 0%, but less than 10% black teachers—decreased from 58, to 8.

Total number of schools with less than 10% black teachers—decreased from 99, to 12.

Number of schools with 50% or more black teachers—increased from 72, to 124.

17. The number of schools by percent black of staffs changed from October, 1969 to October, 1970, as follows:

Number of schools without black teachers—decreased from 6, to 4.

Number of schools with more than 0%, but less than 10% black teachers—decreased from 41, to 8.

Total number of schools with less than 10% black teachers—decreased from 47, to 12.

Number of schools with 50% or more black teachers—increased from 120, to 124.

18. The total number of transfers necessary to achieve a faculty racial quota in each school corresponding to the system-wide ratio, and ignoring all other elements is, as of 1970, 1,826.

19. If account is taken of other elements necessary to assure quality integrated education, including qualifications to teach the subject area and grade level, balance of

experience, and balance of sex, and further account is taken of the uneven distribution of black teachers by subject taught and sex, the total number of transfers which would be necessary to achieve a faculty racial quota in each school corresponding to the system-wide ratio, if attainable at all, would be infinitely greater.

20. Balancing of staff by qualifications for subject, and grade level, then by race, experience and sex, is educationally desirable and important.

21. It is important for students to have a successful role model, especially black students in certain schools, and at certain grade levels.

22. A quota of racial balance for faculty in each school which is equivalent to the system-wide ratio and without more is educationally undesirable and arbitrary.

23. A severe teacher shortage in the 1950s and 1960s impeded integration-of-faculty opportunities.

24. Disadvantageous teaching conditions in Detroit in the 1960s—salaries, pupil mobility and transiency, class size, building conditions, distance from teacher residence, shortage of teacher substitutes, etc.—made teacher recruitment and placement difficult.

25. The Board did not segregate faculty by race, but rather attempted to fill vacancies with certified and qualified teachers who would take offered assignments.

26. Teacher seniority in the Detroit system, although measured by system-wide service, has been applied consistently to protect against involuntary transfers and "bumping" in given schools.

27. Involuntary transfers of teachers have occurred only because of unsatisfactory ratings or because of decrease of teacher services in a school, and then only in accordance with balanced staff concept.

28. There is no evidence in the record that Detroit teacher seniority rights had other than equitable purpose or effect.

29. Substantial racial integration of staff can be achieved, without disruption of seniority and stable teaching relationships, by application of the balanced staff concept to naturally occurring vacancies and increases and reductions of teacher services.

30. The Detroit Board of Education has entered into successive collective bargaining contracts with the Detroit Federation of Teachers, which contracts have included provisions promoting integration of staff and students.

The Detroit School Board has, in many other instances and in many other respects, undertaken to lessen the impact of the forces of segregation and attempted to advance the cause of integration. Perhaps the most obvious one was the adoption of the April 7 Plan. Among other things, it has denied the use of its facilities to groups which practice racial discrimination; it does not permit the use of its facilities for discriminatory apprentice training programs; it has opposed state legislation which would have the effect of segregating the district; it has worked to place black students in craft positions in industry and the building trades; it has brought about a substantial increase in the percentage of black students in manufacturing and construction trade apprenticeship classes; it became the first public agency in Michigan to adopt and implement a policy requiring affirmative act of contractors with which it deals

to insure equal employment opportunities in their work forces; it has been a leader in pioneering the use of multi-ethnic instructional material, and in so doing has had an impact on publishers specializing in producing school texts and instructional materials; and it has taken other noteworthy pioneering steps to advance relations between the white and black races.

In conclusion, however, we find that both the State of Michigan and the Detroit Board of Education have committed acts which have been causal factors in the segregated condition of the public schools of the City of Detroit. As we assay the principles essential to a finding of de jure segregation, as outlined in rulings of the United States Supreme Court, they are:

1. The State, through its officers and agencies, and usually, the school administration, must have taken some action or actions with a purpose of segregation.

2. This action or these actions must have created or aggravated segregation in the schools in question.

3. A current condition of segregation exists. We find these tests to have been met in this case. We recognize that causation in the case before us is both several and comparative. The principal causes undeniably have been population movement and housing patterns, but state and local governmental actions, including school board actions, have played a substantial role in promoting segregation. It is, the Court believes, unfortunate that we cannot deal with public school segregation on a no-fault basis, for if racial segregation in our public schools is an evil, then it should make no difference whether we classify it de jure or de facto. Our objective, logically, it seems to us, should be to remedy a condition which we believe needs correction.

In the most realistic sense, if fault or blame must be found it is that of the community as a whole, including, of course, the black components. We need not minimize the effect of the actions of federal, state and local governmental officers and agencies, and the actions of loaning institutions and real estate firms, in the establishment and maintenance of segregated residential patterns—which lead to school segregation—to observe that blacks, like ethnic groups in the past, have tended to separate from the larger group and associate together. The ghetto is at once both a place of confinement and a refuge. There is enough blame for everyone to share.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and the subject matter of this action under 28 U.S.C. 1331(a), 1343(3) and (4), 2201 and 2202; 42 U.S.C. 1983, 1988, and 2000d.

2. In considering the evidence and in applying legal standards it is not necessary that the Court find that the policies and practices, which it has found to be discriminatory, have as their motivating forces any evil intent or motive. *Keyes v. Sch. Dist. #1, Denver,* 383 F. Supp. 279. Motive, ill will and bad faith have long ago been rejected as a requirement to invoke the protection of the Fourteenth Amendment against racial discrimination. *Sims v. Georgia,* 389 U.S. 404, 407-8.

3. School districts are accountable for the natural, probable and forseeable consequences of their policies and practices, and where racially identifiable schools are the result of such policies, the school authorities bear the burden of showing that such policies are based on educationally

required, non-racial considerations. *Keyes v. Sch. Dist., supra,* and *Davis v. Sch. Dist. of Pontiac,* 309 F. Supp. 734, and 443 F.2d 573.

4. In determining whether a constitutional violation has occurred, proof that a pattern of racially segregated schools has existed for a considerable period of time amounts to a showing of racial classification by the state and its agencies, which must be justified by clear and convincing evidence. *State of Alabama v. U.S.,* 304 F.2d 583.

5. The Board's practice of shaping school attendance zones on a north-south rather than an east-west orientation, with the result that zone boundaries conformed to racial residential dividing lines, violated the Fourteenth Amendment. *Northcross v. Bd. of Ed., Memphis,* 333 F.2d 661.

6. Pupil racial segregation in the Detroit Public School System and the residential racial segregation resulting primarily from public and private racial discrimination are interdependent phenomena. The affirmative obligation of the defendant Board has been and is to adopt and implement pupil assignment practices and policies that compensate for and avoid incorporation into the school system the effects of residential racial segregation. The Board's building upon housing segregation violates the Fourteenth Amendment. See, *Davis v. Sch. Dist. of Pontiac, supra,* and authorities there noted.

7. The Board's policy of selective optional attendance zones, to the extent that it facilitated the separation of pupils on the basis of race, was in violation of the Fourteenth Amendment. *Hobson v. Hansen,* 269 F. Supp, 401, *aff'd sub nom., Smuck v. Hobson,* 408 F.2d 175.

8. The practice of the Board of transporting black students from overcrowded black schools to other identifiably black schools, while passing closer identifiably white schools, which could have accepted these pupils, amounted to an act of segregation by the school authorities. *Spangler v. Pasadena City Bd. of Ed.*, 311 F. Supp. 501.

9. The manner in which the Board formulated and modified attendance zones for elementary schools had the natural and predictable effect of perpetuating racial segregation of students. Such conduct is an act of de jure discrimination in violation of the Fourteenth Amendment. *U.S. v. School District 151*, 286 F. Supp. 786; *Brewer v. City of Norfolk*, 397 F.2d 37.

10. A school board may not, consistent with the Fourteenth Amendment, maintain segregated elementary schools or permit educational choices to be influenced by community sentiment or the wishes of a majority of voters. *Cooper v. Aaron*, 358 U.S. 1, 12-13, 15-16.

> "A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be." Lucas v. 44th Gen'l Assembly of Colorado, 377 U.S. 713, 736-737.

11. Under the Constitution of the United States and the constitution and laws of the State of Michigan, the responsibility for providing educational opportunity to all children on constitutional terms is ultimately that of the state. *Turner v. Warren County Board of Education*, 313 F. Supp. 380; Art. VIII, §§ 1 and 2, Mich. Constitution; *Dasiewicz v. Bd. of Ed. of the City of Detroit*, 3 N.W.2d 71.

12. That a state's form of government may delegate the power of daily administration of public schools to

officials with less than state-wide jurisdiction does not dispel the obligation of those who have broader control to use the authority they have consistently with the constitution. In such instances the constitutional obligation toward the individual school children is a shared one. *Bradley v. Sch. Bd., City of Richmond,* 51 F.R.D. 139, 143.

13. Leadership and general supervision over all public education is vested in the State Board of Education. Art. VIII, § 3, Mich. Constitution of 1963. The duties of the State Board and superintendent include, but are not limited to, specifying the number of hours necessary to constitute a school day; approval until 1962 of school sites; approval of school construction plans; accreditation of schools; approval of loans based on state aid funds; review of suspensions and expulsions of individual students for misconduct [Op. Atty. Gen., July 7, 1970, No. 4705]; authority over transportation routes and disbursement of transportation funds; teacher certification and the like. M.S.A. 15.1023(1). State law provides review procedures from actions of local or intermediate districts (See M.S.A. 15.3442), with authority in the State Board to ratify, reject, amend or modify the actions of these inferior state agencies. See M.S.A. 15.3467; 15.1919(61); 15.1919(68b); 15.2299(1); 15.1961; 15.3402; *Bridgehampton School District No. 2 Fractional of Carsonville, Mich. v. Supt. of Public Instruction,* 323 Mich. 615. In general, the state superintendent is given the duty "[t]o do all things necessary to promote the welfare of the public schools and public educational instructions and provide proper educational facilities for the youth of the state." M.S.A. 15.3252. See also M.S.A. 15.2299(57), providing in certain instances for reorganization of school districts.

14. State officials, including all of the defendants, are charged under the Michigan constitution with the duty

of providing pupils an education without discrimination with respect to race. Art. VIII, § 2, Mich. Constitution of 1963. Art. I, § 2, of the constitution provides:

> "No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation."

15. The State Department of Education has recently established an Equal Educational Opportunities section having responsibility to identify racially imbalanced school districts and develop desegregation plans. M.S.A. 15.3355 provides that no *school* or department shall be kept for any person or persons on account of race or color.

16. The state further provides special funds to local districts for compensatory education which are administered on a per school basis under direct review of the State Board. All other state aid is subject to fiscal review and accounting by the state. M.S.A. 15.1919. See also M.S.A. 15.1919(68b), providing for special supplements to merged districts "for the purpose of bringing about uniformity of educational opportunity for all pupils of the district." The general consolidation law M.S.A. 15.3401 authorizes annexation for even noncontiguous school districts upon approval of the superintendent of public instruction and electors, as provided by law. Op. Atty. Gen., Feb. 5, 1964, No. 4193. Consolidation with respect to so-called "first class" districts, *i.e.*, Detroit, is generally treated as an annexation with the first class district being the surviving entity. The law provides procedures covering all necessary considerations. M.S.A. 15.3184, 15.3186.

17. Where a pattern of violation of constitutional rights is established the affirmative obligation under the Fourteenth Amendment is imposed on not only individual school districts, but upon the State defendants in this case. *Cooper v. Aaron,* 358, U.S. 1; *Griffin v. County School Board of Prince Edward County,* 337 U.S. 218; *U.S. v. State of Georgia,* Civ. No. 12972 (N.D. Ga., December 17, 1970), *rev'd on other grounds,* 428 F.2d 377; *Godwin v. Johnston County Board of Education,* 301 F. Supp. 1337; *Lee v. Macon County Board of Education,* 267 F. Supp. 458 (M.D. Ala.), *aff'd sub nom., Wallace v. U.S.,* 389 U.S. 215; *Franklin v. Quitman County Board of Education,* 288 F. Supp. 509; *Smith v. North Carolina State Board of Education,* No. 15,072 (4th Cir., June 14, 1971).

The foregoing constitutes our findings of fact and conclusions of law on the issue of segregation in the public schools of the City of Detroit.

Having found a de jure segregated public school system in operation in the City of Detroit, our first step, in considering what judicial remedial steps must be taken, is the consideration of intervening parent defendants' motion to add as parties defendant a great number of Michigan school districts located out county in Wayne County, and in Macomb and Oakland Counties, on the principal premise or ground that effective relief cannot be achieved or ordered in their absence. Plaintiffs have opposed the motion to join the additional school districts, arguing that the presence of the State defendants is sufficient and all that is required, even if, in shaping a remedy, the affairs of these other districts will be affected.

In considering the motion to add the listed school districts we pause to note that the proposed action has to do with relief. Having determined that the circumstances

of the case require judicial intervention and equitable relief, it would be improper for us to act on this motion until the other parties to the action have had an opportunity to submit their proposals for desegregation. Accordingly, we shall not rule on the motion to add parties at this time. Considered as a plan for desegregation the motion is lacking in specifity and is framed in the broadest general terms. The moving party may wish to amend its proposal and resubmit *it* as a comprehensive plan of desegregation.

In order that the further proceedings in this cause may be conducted on a reasonable time schedule, and because the views of counsel respecting further proceedings cannot but be of assistance to them and to the Court, this cause will be set down for *pre-trial* conference on the matter of relief. The conference will be held in our Courtroom in the City of Detroit at ten o'clock in the morning, October 4, 1971.

DATED: Sept. 27, 1971.

STEPHEN J. ROTH /s/
Stephen J. Roth
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RONALD BRADLEY, et al., Plaintiffs, v. WILLIAM G. MILLIKEN, et al., Defendants, DETROIT FEDERATION OF TEACHERS, LOCAL No. 231, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, Defendant-Intervenor, and DENISE MAGDOWSKI, et al., Defendants-Intervenor	CIVIL ACTION NO. 35257

ORDER OF NOVEMBER 5, 1971

At a session of said Court held in the Federal Building, City of Detroit, on this 4th day of OCTOBER, A.D. 1971.

Present: HONORABLE STEPHEN J. ROTH
United States District Judge

The Court having entered its findings of fact and conclusions of law on the issue of segregation on September 27, 1971;

IT IS ORDERED that the Detroit Board of Education submit a report on and an evaluation of the so-called Magnet Plan within 30 days; and that other parties litigant may within 10 days thereafter file responses to such report and evaluation.

IT IS FURTHER ORDERED that the Detroit Board of Education submit a plan for the desegregation of its schools within 60 days.

IT IS FUTHER ORDERED that the State defendants submit a metropolitan plan of desegregation within 120 days.

IT IS FURTHER ORDERED that as to both the Detroit and the State plans, other parties litigant shall have an additional 30 days in which to submit objections and/or alternate plans.

STEPHEN J. ROTH /s/
United States District Judge

DATE SIGNED: November 5, 1971.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RONALD BRADLEY, et al., Plaintiffs, v. WILLIAM G. MILLIKEN, et al., Defendants, DETROIT FEDERATION OF TEACHERS, LOCAL No. 231, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, Defendant-Intervenor, and DENISE MAGDOWSKI, et al., Defendants-Intervenor *et al.*	CIVIL ACTION NO. 35257

RULING ON PROPRIETY OF CONSIDERING A METROPOLITAN REMEDY TO ACCOMPLISH DESEGREGATION OF THE PUBLIC SCHOOLS OF THE CITY OF DETROIT

In its prior ruling, "Ruling on Issue of Segregation" (September 27, 1971), the court has found that segregation exists in the public schools of the City of Detroit because of, among other causes, the acts of the State of Michigan and the Detroit Board of Education. In the language of *Swann*,[1] "a right and a violation have been

shown."[2] Given the constitutional violation, judicial authority, when properly invoked, must be exercised to right the wrong. In addressing itself to this task the Supreme Court has said that the "scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."[3] And, it pointed out, "a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right."[4] The task is to correct the condition which offends the Constitution. Illustrative of what was meant by the Supreme Court, see the legislative and congressional reapportionment cases.[5]

Under the circumstances of this case,[6] the question presented is whether the court may consider relief in the form of a metropolitan plan, encompassing not only the City of Detroit, but the larger Detroit metropolitan area which, for the present purposes, we may define as comprising the three counties of Wayne, Oakland and Macomb. It should be noted that the court has just concluded its hearing on plans submitted by the plaintiffs and the Detroit Board of Education for the intra-city

---

[1]
Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1.

[2]
Ibid., p. 15.

[3]
Ibid., p. 15.

[4]
Ibid., pp. 15, 16.

[5]
Reynolds v. Sims, 377 U.S. 533.

[6]
See "Ruling on Issue of Segregation," supra, indicating a black student projection for the school year 1980-81 of 80.7%.

desegregation of the Detroit public schools. A ruling has not yet been made on these plans, but in accordance with the mandate of the Court of Appeals that a hearing on the merits be concluded at the earliest possible time, we consider it necessary to proceed apace with a resolution of the issue before us, *i.e.*, the propriety of weighing the legal availability of a metropolitan remedy for segregation.

The State defendants in this case take the position, as we understand it, that no "state action" has had a part in the segregation found to exist. This assertion disregards the findings already made by this court, and the decision of the Court of Appeals as well.[7] Additionally, they appear to view the delegation of the State's powers and duties with respect to education to local governmental bodies as vesting the latter with sovereign powers which may not be disturbed by either the State or the court. This we cannot accept. Political subdivisions of the states have never been considered sovereign entities, rather "they have been traditionally regarded as subordinate governmental instrumentalities created by the state to assist it in carrying out of state governmental functions." *Reynolds v. Sims,* 377 U.S. 533, 575. Perhaps the clearest refutation of the State's asserted lack of power to act in the field of education is Act 48 of 1970. The State cannot evade its constitutional responsibility by a delegation of powers to local units of government. The State defendants' position is in error in two other respects: 1. The local school districts are not fully autonomous bodies, for the extent it has seen fit the State retains control and supervision; and 2. It assumes that

---

[7] See "Ruling on Issue of Segregation," supra; Bradley v. Milliken, 433 F.2d 897.

any metropolitan plan, if one is adopted, would, of necessity, require the dismantling of school districts included in the plan.

The main thrust of the objections to the consideration of a metropolitan remedy advanced by intervening school districts is that, absent a finding of acts of segregation on their part, individually, they may not be considered in fashioning a remedy for relief of the plaintiffs. It must be conceded that the Supreme Court has not yet ruled directly on this issue; accordingly, we can only proceed by feeling our way through its past decisions with respect to the goal to be achieved in school desegregation cases. *Green v. County School Board,* 391 U.S. 430, teaches us that it is our obligation to assess the effectiveness of proposed plans of desegregation in the light of circumstances present and the available alternatives; and to choose the alternative or alternatives which promise realistically to work now and hereafter to produce the maximum actual desegregation. As Chief Justice Burger said in *Swann,* "in seeking to define the scope of remedial power of courts in an area as sensitive as we deal with here, words are poor instruments to convey the sense of basic fairness inherent in equity." Substance, not semantics, must govern.

It seems to us that *Brown*[8] is dispositive of the issue:

> "In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools

as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them."

• • •

" • • • the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation systems, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems."

We conclude that it is proper for the court to consider metropolitan plans directed toward the desegregation of the Detroit public schools as an alternative to the present intra-city desegregation plans before it and, in the event that the court finds such intra-city plans inadequate to desegrate such schools, the court is of the opinion that it is required to consider a metropolitan remedy for desegregation.

---

[8]

Brown v. Bd. of Ed. of Topeka, 349 U.S. 294, at 300 and 301.

The schedule previously established for the hearing on metropolitan plans will go forward as noticed, beginning March 28, 1972.

DATE: March 24th, 1972.

STEPHEN J. ROTH /s/
Stephen J. Roth
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RONALD BRADLEY, et al., Plaintiffs, v. WILLIAM G. MILLIKEN, et al., Defendants, DETROIT FEDERATION OF TEACHERS, LOCAL No. 231, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, Defendant-Intervenor, and DENISE MAGDOWSKI, et al., Defendants-Intervenor	CIVIL ACTION NO. 35257

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON DETROIT-ONLY PLANS OF DESEGREGATION

In accordance with orders of the court defendant Detroit Board of Education submitted two plans, limited to the corporate limits of the city, for desegregation of the public schools of the City of Detroit, which we will refer to as Plan A and Plan C; plaintiffs submitted a similarly limited plan, which will be referred to as the Foster Plan. Hearings were had on said plans on March

14, 15, 16, 17 and 21, 1972. In considering these plans the court does not limit itself to the proofs offered at the hearing just concluded; it considers as part of the evidence bearing on the issue (*i.e.*, City-Only Plans) all proofs submitted in the case to this point, and it specifically incorporates herein by reference the Findings and Conclusions contained in its "Ruling on Issue of Segregation," filed September 27, 1971.

The court makes the following factual findings:

PLAN A.

1. The court finds that this plan is an elaboration and extension of the so-called Magnet Plan, previously authorized for implementation as an interim plan pending hearing and determination on the issue of segregation.

2. As proposed we find, at the high school level, that it offers a greater and wider degree of specialization, but any hope that it would be effective to desegrate the public schools of the City of Detroit at that level is virtually ruled out by the failure of the current model to achieve any appreciable success.

3. We find, at the Middle School level, that the expanded model would affect, directly, about 24,000 pupils of a total of 140,000 in the grades covered; and its effect would be to set up a school system within the school system, and would intensify the segregation in schools not included in the Middle School program. In this sense, it would increase segregation.

4. As conceded by its author, Plan A is neither a desegregation nor an integration plan.

PLAN C.

1. The court finds that Plan C is a token or part-time desegregation effort.

2. We find that this plan covers only a portion of the grades and would leave the base schools no less racially identifiable.

PLAINTIFFS' PLAN.

1. The court finds that Plaintiffs' Plan would accomplish more desegregation than now obtains in the system, or would be achieved under Plan A or Plan C.

2. We find further that the racial composition of the student body is such that the plan's implementation would clearly make the entire Detroit public school system racially identifiable as Black.

3. The plan would require the development of transportation on a vast scale which, according to the evidence, could not be furnished, ready for operation, by the opening of the 1972-73 school year. The plan contemplates the transportation of 82,000 pupils and would require the acquisition of some 900 vehicles, the hiring and training of a great number of drivers, the procurement of space for storage and maintenance, the recruitment of maintenance and the not negligible task of designing a transportation system to service the schools.

4. The plan would entail an overall recasting of the Detroit school system, when there is little assurance that it would not have to undergo another reorganization if a metropolitan plan is adopted.

5. It would involve the expenditure of vast sums of money and effort which would be wasted or lost.

6. The plan does not lend itself as a building block for a metropolitan plan.

7. The plan would make the Detroit school system more identifiably Black, and leave many of its schools 75 to 90 per cent Black.

8. It would change a school system which is now Black and White to one that would be perceived as Black, thereby increasing the flight of Whites from the city and the system, thereby increasing the Black student population.

9. It would subject the students and parents, faculty and administration, to the trauma of reassignments, with little likelihood that such reassignments would continue for any appreciable time.

In summary, we find that none of the three plans would result in the desegregation of the public schools of the Detroit school district.

CONCLUSIONS OF LAW

1. The court has continuing jurisdiction of this action for all purposes, including the granting of effective relief. See Ruling on Issue of Segregation, September 27, 1971.

2. On the basis of the court's finding of illegal school segregation, the obligation of the school defendants is to adopt and implement an educationally sound, practi-

cable plan of desegregation that promises realistically to achieve now and hereafter the greatest possible degree of actual school desegregation. *Green v. County School Board,* 391 U.S. 430; *Alexander v. Holmes County Board of Education,* 396 U.S. 19; *Carter v. West Feliciana Parish School Board,* 396 U.S. 290; *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1.

3. Detroit Board of Education Plans A and C are legally insufficient because they do not promise to effect significant desegregation. *Green v. County School Board, supra,* at 439-440.

4. Plaintiffs' Plan, while it would provide a racial mix more in keeping with the Black-White proportions of the student population than under either of the Board's plans or as the system now stands, would accentuate the racial identifiability of the district as a Black school system, and would not accomplish desegregation.

5. The conclusion, under the evidence in this case, is inescapable that relief of segregation in the public schools of the City of Detroit cannot be accomplished within the corporate geographical limits of the city. The State, however, cannot escape its constitutional duty to desegregate the public schools of the City of Detroit by pleading local authority. As Judge Merhige pointed out in *Bradley v. Richmond,* (slip opinion p. 64):

> "The power conferred by state law on central and local officials to determine the shape of school attendance units cannot be employed, as it has been here, for the purpose and with the effect of sealing off White conclaves of a racial composition more appealing to the local electorate and obstructing the desegregation of schools. The equal protection clause

has required far greater inroads on local government structure than the relief sought here, which is attainable without deviating from state statutory forms. Compare Reynolds v. Sims, 377 U.S. 533; Gomillion v. Lightfoot, 364 U.S. 339; Serrano v. Priest, 40 U.S. L.W. 2128 (Calif. Sup. Ct. Aug. 30, 1971).

"In any case, if political boundaries amount to insuperable obstacles to desegration because of structural reason, such obstacles are self-imposed. Political subdivision lines are creations of the state itself, after all."

School district lines are simply matters of political convenience and may not be used to deny constitutional rights. If the boundary lines of the school districts of the City of Detroit and the surrounding suburbs were drawn today few would doubt that they could not withstand constitutional challenge. In seeking for solutions to the problem of school segregation, other federal courts have not "treated as immune from intervention the administrative structure of a state's educational system, to the extent that it affects the capacity to desegregate. Geographically or administratively independent units have been compelled to merge or to initiate or continue cooperative operation as a single system for school desegregation purposes."[1]

That the court must look beyond the limits of the Detroit school district for a solution to the problem of segregation in the Detroit public schools is obvious; that it has the authority, nay more, the duty to (under the circumstances of this case) do so appears plainly antici-

---

[1]

Bradley v. Richmond, supra (slip opinion p. 68).

pated by Brown II,[2] seventeen years ago. While other school cases have not had to deal with our exact situation,[3] the logic of their application of the command of Brown II supports our view of our duty.

Date: MARCH 28th, 1972.

STEPHEN J. ROTH /s/
Stephen J. Roth
United States District Judge

---

[2]

Brown v. Bd. of Ed. of Topeka, 349 U.S. 294, pp. 300-301.

[3]

Haney v. County Board of Education of Sevier County, 410 F.2d 920 (8th Cir. 1969); Bradley v. School Board of the City of Richmond, supra, slip opinion pp. 664-65; Hall v. St. Helena Parish School Board, 197 F. Supp. 649 (E.D. La. 1961), aff'd. 287 F.2d 376 (5th Cir. 1961) and 368 U.S. 515 (1962); Lee v. Macon County Bd. of Educ., 448 F. 2d 746, 752 (5th Cir. 1971); Gomillion v. Lightfoot, 364 U.S. 339 (1960); Turner v. Littleton-Lake Gaston School Dist., 442 F.2d 584 (4th Cir. 1971); United States v. Texas, 447 F.2d 551 (5th Cir. 1971); Lemon v. Bossier Parish School Board, 446 F.2d 911 (5th Cir. 1971).

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RONALD BRADLEY, et al Plaintiffs-Appellees, Cross-Appellants, v. WILLIAM G. MILLIKEN, et al Defendants-Appellants, Cross-Appellee, DETROIT FEDERATION OF TEACHERS LOCAL 231, AMERICAN FEDERATION OF TEACHERS, AFL-CIO Defendant-Intervenor-Appellee, and DENISE MAGDOWSKI, et al Defendants-Intervenor.	NOS. 72-1064 72-1065 72-1066

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Before: CELEBREZZE, MC CREE and KENT, Circuit Judges.

These are appeals from an order entered on November 5, 1971, following a "pretrial conference" held on October 4, 1971. The order from which these appeals are taken requires the parties to submit proposed plans for desegregation of the Detroit schools within a stipulated period of

time which time had not passed at the time the appeals were filed. The order in question is not a final order within the meaning of Title 28 U.S.C. § 1291, neither is it an interlocutory order or decree which may be appealed to this Court under Title 28 U.S.C. § 1292(a).

No party to the action has sought a certificate from the District Court or from this Court for an interlocutory appeal under the provisions of Title 28 U.S.C. § 1292(b). There being no final order from which an appeal may be taken, and the cross-appellants having agreed that their appeal may be dismissed with the original appeal,

IT IS ORDERED that the motions to dismiss the appeals be granted.

ENTERED BY ORDER OF THE
COURT
JAMES A. HIGGINS /s/
Clerk

INDEX

Opinions and orders Below 1

Jurisdiction 1

Question Presented 2

Statutory Provisions Involved 3

Statement of the Case 3

Reasons for Granting the Writ 7

Conclusion 12

CITATIONS

Cases:

Bradley et al v *School Board of the City of Richmond*,
338 F Supp 67 (1972) 10, 11

Brown v *Board of Education of Topeka*,
344 US 1 (1952) 11

Brown v *Board of Eduction*
347 US 483 (1954) 8

Carter v *Carter Coal Co.*,
298 US 238 12

Ex parte Quirin,
317 US 1 12

Ex Rel Workman v *Detroit Board of Education*,
18 Mich 399 (1869) 8

Keyes v *School District No. 1, Denver*,
445 F 2d 990 (CA 10, 1971, cert granted 404 US 1036
(1972) 10,11

Railroad Retirement Board v *Alton R. Co.*,
295 US 330 12

Rickert Rice Mills v *Fontenot*,
297 US 110 12

Spencer v *Kugler*,
326 F Supp 1235; affirmed 404 US 1027 (1972) 9

Swann v *Charlotte-Mecklenburg Board of Education*,
402 US 1 (1971) 9, 10, 11, 12

Taylor v *McElroy*,
360 US 709 (1959) 11

United States v *Bankers Trust Co.*,
294 US 240 12

United States v *United Mine Workers*,
330 US 258 12

Youngstown Co v *Sawyer*,
343 US 579 12

Statutes:

Supreme Court Rules
Rule 20 2

United States Code, Title 28
Section 1254 1
Section 1291 ..... 1, 3
Section 2101 (e) 2

IN THE

SUPREME COURT FOR THE UNITED STATES

October Term 1971

No. 71-1468

WILLIAM G. MILLIKEN, Governor of the State of Michigan, et al.,

Petitioners,

-vs-

RONALD BRADLEY, et al.,

Respondents.

BRIEF OF RESPONDENTS SCHOOL DISTRICTS* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS AND ORDERS BELOW

The pertinent orders and opinions of the District Court and the United States Court of Appeals are fully set forth in the Appendix to the Petition For Writ of Certiorari.

JURISDICTION

The Petition For Writ Of Certiorari invokes the jurisdiction of the Court under Section 1291 of Title 28, United States Code.

The undersigned Respondents submit that the Court also may, and should, invoke jurisdiction pursuant to Section 1254 of Title 28, United States Code, which provides, in part, as follows:

---

* Respondents school districts include the forty-three (43) intervening school districts in this cause but exclude the defendant Board of Education for the City of Detroit.

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of Certiorari granted upon the petition of any party to any civil or criminal case, *before or after* rendition of judgment or decree;" [Emphasis supplied.]

While the undersigned Respondents concur with the contention of Petitioners that all of the questions presented should be determined by this Court as prayed, it is respectfully submitted that the imperative public importance of question number III set forth in the Petition For Writ Of Certiorari provides the basis and urgent need for this Court to exercise its jurisdiction pursuant to Rule 20 of the Supreme Court Rules and Section 2101 (e) of Title 28, United States Code.

Section 2101 (e) of Title 28, United States Code, provides as follows:

"An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment."

Rule 20 of the Supreme Court Rules states that –

"A writ of certiorari to review a case pending in a court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court."

QUESTION PRESENTED

Where a single school district has been found to have committed acts of *de jure* segregation, may a court constitutionally issue a desegregation order extending to some eighty-five (85) other independent school districts and requiring massive bussing of children, absent (i) any claim or finding that such other independent school districts have deliberately operated in furtherance of a policy to deny access to or separate pupils in

schools on the basis of race, or, (ii) absent any claim or finding that the boundary lines of such other independent school districts were created or have been maintained with the purpose of creating or fostering a dual school system?[1]

The undersigned Respondents contend that the answer is "NO". The Court of Appeals For The Sixth Circuit did not consider the question.

STATUTORY PROVISIONS INVOLVED

Section 1291 of Title 28, United States Code, provides:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

STATEMENT OF THE CASE

The Statement Of The Case as set forth in the Petition For Writ Of Certiorari is adopted by the undersigned Respondents. In addition, Respondents-Intervenors submit the facts hereinafter recited.

The instant action was commenced on August 18, 1970, by the filing of a complaint which alleged the unconstitutionality of a Michigan statute which was applicable only to the City of Detroit school district and further claimed that plaintiffs' constitutional rights were violated because of the segregated pattern of pupil assignments and the racial identifiability of schools within the City of Detroit school system. The complaint has never been amended and to this date there has been no claim

---

[1] Although the undersigned Respondents concur with Questions I and II as presented in the Petition For Writ Of Certiorari their interests are directly affected only to the extent of the constitutional propriety or impropriety of a so-called metropolitan plan of desegregation. Even assuming, *arguendo*, that the City of Detroit school district is not a unitary school system, the question of whether the judicial remedy may extend beyond the nature and locus of the constitutional violation remains.

that any school district other than Detroit has failed to operate a unitary school system.

The complaint, the trial on the merits and the District Court's "Ruling On Issue of Segregation"[2] were directed at and solely concerned with the issue of whether the Detroit school system was operated so as to impair the constitutional rights of the plaintiffs. Accordingly, the undersigned Respondents had no cause or standing to intervene in the proceedings inasmuch as no claim was made against them and no relief was sought which would affect them.

On November 5, 1971, however, the District Court issued an order which adumbrated a dramatic change in the nature of the proceedings. Despite having conducted a trial limited to the issue of unlawful segregation in the Detroit school system and having made findings limited to such issue, the court ordered the State defendants to submit a plan of desegregation which would embrace the entire metropolitan Detroit area. By judicial fiat some eighty-five (85) independent school districts were suddenly faced with the prospect of being subjected to judicial sanction without any claim, trial or finding that they had engaged in any unconstitutional acts. Pursuant to the aforementioned order, on February 4, 1972, a so-called metropolitan plan of desegration was filed with the District Court.

On February 9th, 16th and 17th, respectively, the undersigned Respondents, Grosse Pointe Public Schools, Allen Park Public Schools, et al, Southfield Public Schools and School District for the City of Royal Oak, filed motions to intervene for the purpose of representing their interests and those of the parents and children situate in said school districts.

On March 15, 1972, the District Court issued its order granting said Respondents' motions to intervene as a matter of right, and simultaneously imposed the following conditions designed to circumscribe Respondents' participation in the proceedings.

---

[2] Appendix to Petition For Writ Of Certiorari, page 1a.

"1. No intervenor will be permitted to assert any claim or defense previously adjudicated by the court.

"2. No intervenor shall reopen any question or issue which has previously been decided by the court.

"3. The participation of the intervenors considered this day shall be subordinated to that of the original parties and previous intervenors.

"4. The new intervenors shall not initiate discovery proceedings except by permission of the court upon application in writing, accompanied by a showing that no present party plans to or is willing to undertake the particular discovery sought and that the particular matter to be discovered is relevant to the current stage of the proceedings.

"5. No new intervenor shall be permitted to seek a delay of any proceeding in this cause: and he shall be bound by the brief and hearing schedule established by the court's Notice to Counsel, issued March 6, 1972.

"6. New intervenors will not file counterclaims or cross-complaints; nor will they be permitted to seek the joinder of additional parties or the dismissal of present parties, except upon a showing that such action will not result in delay.

"7. New intervenors are granted intervention for two principal purposes: (a) To advise the court, by brief, of the legal propriety or impropriety of considering a metropolitan plan; (b) To review any plan or plans for the desegregation of the so-called larger Detroit Metropolitan area, and submitting objections, modifications or alternatives to it or them, and in accordance with the requirements of the United States Consititution and the prior orders of this court.

"8. New intervenors shall present evidence, if any they have, through witnesses to a number to be set, and limited, if necessary, by the court, following conference.

"9. With regard to the examination of witnesses, all new intervenors shall among themselves select one attorney per witness to act for them, unless one or more of the new intervenors show cause otherwise."

Respondents intervening school districts filed written objections with the District Court against the imposition of such conditions. To date the District Court has made no response to said objections.

Upon being granted right to intervene on March 15, 1972, the District Court advised the Respondents-Intervenors that the Court had previously set March 22, 1972, as the date for filing of briefs on the legal propriety of a metropolitan plan of desegregation and that Respondents-Intervenors thus had one (1) week to present their legal arguments on such issue. On March 24, 1972, two (2) days after the due date for the filing of briefs, the District Court issued a "Ruling On Propriety Of Considering A Metropolitan Remedy To Accomplish Desegregation Of The Public Schools Of The City Of Detroit".[3]

The District Court commenced taking testimony on a metropolitan plan of desegregation at 10:10 a.m. on March 28, 1972. About two hours after Respondents-Intervenors counsel had first appeared in the District Court and before completion of testimony of a single witness, the District Judge announced that all counsel could stop by his office and pick up his Findings of Fact and Conclusions of Law on Detroit-Only Plans of Desegregation.[4] Relying upon inapposite cases where a dual school system was fostered and operated pursuant to state policy, the District Court announced its intention to seek a racial mix by means of a metropolitan plan of desegregation.

---

[3] Appendix to Petition For Writ Of Certiorari, page 31a.

[4] Appendix to Petition For Writ Of Certiorari, page 37a.

REASONS FOR GRANTING THE WRIT

A So-Called Metropolitan Plan Of Desegregation Is Constitutionally Improper Absent A Complaint And Finding That Respondents-Intervenors School Districts Have Denied Access To Or Separated Pupils On The Basis Of Race, Or Absent A Finding That The Respondents-Intervenors School Districts Were Created Or Maintained With The Purpose Of Creating Or Fostering A Dual School System.

The instant case is without precedent in terms of the scope of the judicial remedy determined by the District Court, the lack of fundamental due process so far as Respondents-Intervenors are concerned and the absence of any findings against Respondents-Intervenors upon which relief can be predicated.

There are upwards of 600 independent school districts in the State of Michigan. The only complaint ever filed in this action alleges that *one* of those school districts, the City of Detroit, has failed to maintain a unitary school system due to actions of the Detroit Board of Education and certain executive officers of the State. The trial on the merits was confined to the issue of *de jure* segregation in the Detroit school system. The decision of the District Court following a trial on the issues framed by the complaint made no findings of *de jure* segregation with respect to any school district except the City of Detroit.[5]

Despite the fact that there has never been any claim that the undersigned Respondents have failed to maintain a unitary school system, that said Respondents have had no opportunity to be heard on the issue of segregation, that there is not a scintilla, indeed not a tittle, of evidence, that Respondents have denied access to or separated pupils on the basis of race, the District Court has determined that said Respondents are to be subjected to a desegregation plan calling for massive bussing of possibly up to one million children.

---

[5] "Ruling On Issue of Segregation", Appendix to Petition For Writ Of Certiorari, page 1a.

The extreme public importance of this case can be gauged by the fact that the number of children affected by the remedy decreed in this action exceeds the respective populations of twelve (12) of the States in this country. The educational future of nearly 1,000,000 children clearly warrants the attention and exercise of jurisdiction by this Court.

Since the public announcement of the District Court's determination to fashion a desegregation plan calling for massive bussing on a scale heretofore unheard of, school districts in the metropolitan Detroit area have been unable to secure voter approval at millage elections and are faced with lack of financial resources necessary to maintain an adequate educational system. Elected school officials cannot plan for the future needs of their students because of the uncertainty as to which students' needs they must meet and the number of students they must accommodate. Expenses connected with the massive bussing program inherent in the District Court's determination will run into the tens of millions of dollars and threaten the continuance of educational programs by already financially hard-pressed educational systems. Planning for future building needs and construction cannot proceed with certainty. Indeed, the assumption by the District Court of the power and authority to ignore and dismantle State-established governmental entities places the continued existence of the school districts in jeopardy.

There is a critical distinction between this case and *Brown* v *Board of Education*, 347 US 483 (1954) and its progeny heretofore considered by this Court. There is no claim or finding in the instant case that the State of Michigan has ever fostered or maintained a dual school system. Over one hundred years ago the Michigan Supreme Court in *Ex Rel Workman* v *Detroit Board of Education*, 18 Mich 399 (1869), declared that under Michigan law black children are placed on the same footing with white children, and admissible on the same terms to all schools.

Where there is no evidence of a state policy of maintaining a dual school system, the naked existence of school districts established along the lines of municipalities, and other govern-

mental entities, does not give rise to a deprivation of constitutional rights. *Spencer* v *Kugler*, 326 F Supp 1235, 1242 (1971); affirmed 404 US 1027 (1972).

The independent school districts in the metropolitan Detroit area, including the Detroit school system, were established pursuant to a State policy of maintaining a unitary school system and the fact that there now exists a racial imbalance in the Detroit school district does not amount to unconstitutional segregation attributable to the establishment or maintenance of the suburban school districts.

In the "Ruling On A Metropolitan Plan" the District Court took cognizance of the lack of precedent for the implementation of such a plan in light of the circumstances here involved, as follows:

> "The main thrust of the objections to the consideration of a metropolitan remedy advanced by intervening school districts is that, absent a finding of acts of segregation on their part, individually, they may not be considered in fashioning a remedy for relief of the plaintiffs. *It must be conceded that the Supreme Court has not yet ruled directly on this issue;* accordingly, we can only proceed by feeling our way through its past decisions with respect to the goal to be achieved in school desegregation cases . . . ."[6] [Emphasis supplied.]

It is respectfully submitted that the welfare of nearly 1,000,000 children should not be jeopardized due to the lack of cogent ruling by this Court and the District Court's "feeling" its way to decision.

Pronouncements of this Court in *Swann* v *Charlotte-Mecklenburg Board of Education*, 402 US 1 (1971) indicate that the District Court has in fact lost its way and only a determination by this Court can provide the needed direction.

---

[6] "Ruling On Propriety Of Considering a Metropolitan Remedy To Accomplish Desegregation Of the Public Schools Of The City of Detroit", Appendix to Petition For Writ Of Certiorari, page 34a.

"In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that judicial powers may be exercised *only on the basis of a constitutional violation*. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. *Judicial authority enters only when local authority defaults.*

"School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court. *As with any equity case, the nature of the violation determines the scope of the remedy . . . .*" *Swann, supra*, at page 16. [Emphasis added.]

Here, the only basis of a constitutional violation is the finding of *de jure* segregation in the City of Detroit school district. Local school authority in the eighty-five (85) suburban school districts in the Detroit metropolitan area has not defaulted. The only violation of constitutional rights found by the District Court is the failure of the principal defendants to maintain a unitary school system for approximately 275,000 students *in the City of Detroit*. Yet the judicial remedy authorized by the District Court would relocate hundreds of thousands of children in three counties and up to eighty-five (85) other school districts.

This Court will consider the question of the appropriate scope of a desegregation remedy within a single school district in a non-dual system State when it hears *Keyes* v *School District No. 1, Denver*, 445 F2d 990 (CA 10, 1971), cert granted 404 US 1036 (1972). The case of *Bradley et al v School Board of the City of Richmond*, 338 F Supp 67 (1972), now awaiting deci-

sion in the Court of Appeals for the Fourth Circuit, presents the question of the propriety of cross-district bussing, involving three contiguous school districts, to achieve desegregation where there has been a State-wide dual school system policy. *Bradley* v *Richmond, supra,* will undoubtedly be presented to this Court. Neither of the foregoing cases will, however, reach the issues raised in the instant case.

The Court has previously exercised its power to grant certiorari where the issues presented in other pending cases warranted consideration of all cases at one time. *Taylor* v *McElroy*, 360 US 709 (1959) and *Brown* v *Board of Education of Topeka*, 344 US 1 (1952). The undersigned Respondents suggest that by granting certiorari in this case and hearing the same in conjunction with *Keyes, supra,* and perhaps *Richmond, supra,* the Court will have before it the gamut of desegregation remedies and will be in a position to lay to rest the principal issues associated with the appropriate scope of judicial remedy in school desegregation cases.

The Court of Appeals for the Sixth Circuit admittedly has not considered the substantive questions raised herein with respect to a so-called metropolitan plan of desegregation. These substantive questions are of such monumental constitutional significance and imperative public importance, however, as to warrant the immediate attention of this Court.

The disruptive consequences of a judicial remedy affecting nearly 1,000,000 children and calling for massive cross-district bussing between up to eighty-five (85) school districts is obvious and to delay final decision on the legal propriety of such remedy while the parties trod the traditional path of appeal will serve to exacerbate such disruptive consequences.

It is admittedly the duty of the District Court to effect a remedy which will prevent the impairment of the constitutional rights of children within the Detroit school system. Such remedy should put an end to *de jure* segregation, if it legally exists. The remedy, however, should not be expanded beyond what is necessary to repair the denial of the constitutional right to be protected. As stated in *Swann, supra:*

". . . . The task is to correct, by a balancing of the individual and collective interests, the condition that offends the constitution." *Swann, supra,* at page 16.

The interests of the 750,000 children who attend suburban school districts are of no less importance than the interests of plaintiffs herein. The judicial guidance of this Court is needed now in the interests of all concerned.

CONCLUSION

This matter manifests the characteristics, in terms of public importance, of other cases [7] in which this Court has seen fit to exercise its authority to issue a writ of certiorari, even in the absence of decision by the Court of Appeals. Massive bussing orders to achieve school desegregation, none of which approach the magnitude of the remedy here involved, and the public confusion associated therewith have prompted calls for definitive guidance by the President of the United States, the United States Congress and the public generally. So nebulous is the appropriate scope of judicial remedy in school desegregation cases that a substantial portion of the public, legislative and executive officials have urged the adoption of a constitutional amendment to circumscribe the remedial powers of the courts.

The substantial number of school desegregation cases now pending in District Courts and Courts of Appeals throughout the United States would be expedited by the prompt resolution of the constitutional issues in the instant case.

The circumstances recited herein and in the Petition For Writ Of Certiorari demonstrate the compelling reasons why this Court should grant certiorari.

[7]
United States v *Bankers Trust Co.*, 294 US 240; *Railroad Retirement Board* v *Alton R. Co.*, 295 US 330; *Rickert Rice Mills* v *Fontenot*, 297 US 110; *Carter* v *Carter Coal Co.*, 298 US 238; *Ex parte Quirin*, 317 US 1; *United States* v *United Mine Workers*, 330 US 258; *Youngstown Co.* v *Sawyer*, 343 US 579.

It is respectfully prayed that the Petition For Writ Of Certiorari to the United States Court of Appeals be granted by this Honorable Court to the end that this cause may be timely reviewed and determined by this Court.

Respectfully submitted,

BUTZEL, LONG, GUST, KLEIN & VAN ZILE
John B. Weaver
Robert M. Vercruysse,
Of Counsel

HILL, LEWIS, ADAMS, GOODRICH & TAIT
Robert B. Webster,
Of Counsel

CONDIT AND MC GARRY, P.C.
Richard P. Condit,
Of Counsel

HARTMAN, BEIER, HOWLETT, MC CONNELL & GOOGASIAN
Kenneth B. McConnell,
Of Counsel

WILLIAM M. SAXTON
1881 First National Building
Detroit, Michigan 48226

Counsel for Respondents Allen Park Public Schools, et al, Southfield Public Schools and School District of the City of Royal Oak

DOUGLAS H. WEST
3700 Penobscot Building
Detroit, Michigan 48226

Counsel for Respondent Grosse Pointe Public Schools

Dated: June 5, 1978

RESPONSE OF DEFENDANT DETROIT BOARD OF EDUCATION TO PETITION FOR WRIT OF CERTIORARI FILED BY WILLIAM MILLIKEN AND FRANK J. KELLEY

William B. Riley

GEORGE T. ROUMELL, JR.

LOUIS D. SEER
Counsel for Respondent
Detroit Board of Education

RILEY and ROUMELL
720 Ford – Ford Building
Detroit, Michigan 48226

Dated: June 12, 1972

IN THE

SUPREME COURT OF THE UNITED STATES

NO. _____

WILLIAM G. MILLIKEN, et al,

Petitioners,

vs.

RONALD BRADLEY, et al

Respondents.

RESPONSE OF DEFENDANT DETROIT BOARD OF EDUCATION TO PETITION FOR WRIT OF CERTIORARI FILED BY WILLIAM MILLIKEN AND FRANK J. KELLEY

Defendant DETROIT BOARD OF EDUCATION, pursuant to U.S.S. Ct. Rule 21 (4), in response to the Petition for Writ of Certiorari filed by WILLIAM MILLIKEN and FRANK J. KELLEY, co-defendants herein, in partial support for the aforesaid petition, states as follows:

I.

Respondent DETROIT BOARD OF EDUCATION supports the Petition for Writ of Certiorari and agrees with petitioners MILLIKEN and KELLEY that the order issued by the District Court in this cause on September 27, 1971 was ripe for appeal, and that the action of the U.S. Court of Appeals for the Sixth Circuit in dismissing the appeals of petitioners MILLIKEN and KELLEY and respondent DETROIT BOARD OF EDUCATION was erroneous, for reasons set forth in this respondent's brief to the Court of Appeals, filed cn February 3, 1972, and set forth in the Appendix hereto.

II.

Although petitioners raise and discuss two substantive questions in their petition, respondent DETROIT BOARD OF EDUCATION does not understand them by this petition to ask for review of any issue other than whether the dismissal of the previous appeals by the Court of Appeals was proper. Therefore, it does not appear necessary to state a detailed response to questions II and III as raised by petitioners.

As a matter of record the DETROIT BOARD OF EDUCATION agrees with petitioners insofar as petitioners argue that the record in the trial court does not support a finding of the existence of a dual school system in the Detroit Public Schools or justify any remedy. If it should be found that some kind of remedy is appropriate, insofar as the petitioners argue that as a matter of law any remedy ordered must be restricted to the jurisdiction of the School District of the City of Detroit, and may not involve schools operated by other agencies of the State of Michigan, respondent DETROIT BOARD OF EDUCATION disagrees.

CONCLUSION

While agreeing in part and disagreeing in part with petitioners other contentions, respondent DETROIT BOARD OF EDUCATION supports the Petition for Writ of Certiorari for the purpose of reviewing the dismissal of appeals by the Court of Appeals.

Respectfully submitted

GEORGE T. ROUMELL, JR.
LOUIS D. BEER
Counsel for Respondent
Detroit Board of Education

Riley and Roumell
7th Floor – Ford Building
Detroit, Michigan 48226

Dated: June 12, 1972

APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

NO. _____

RONALD BRADLEY, et al.,

Plaintiffs–Appellants,
Cross-Appellee,

vs.

WILLIAM G. MILLIKEN, et al.,

Defendants-Appellees,
Cross-Appellants,

DETROIT FEDERATION OF TEACHERS, LOCAL 231,
AMERICAN FEDERATION OF TEACHERS, AFL-CIO

Defendant-Intervenor-
Appellee,

and

DENISE MAGDOWSKI, et al.,

Defendants-Intervenor.

Appeal from the United States District Court
for the Eastern District of Michigan
Southern Division

ANSWER OF DEFENDANTS BOARD OF EDUCATION FOR THE CITY OF DETROIT TO MOTION TO DISMISS APPEALS

STATEMENT OF THE ISSUE

Is the order dated November 5, 1971, which incorporates the final findings of fact and conclusions of law that the Defendants Board of Education for the City of Detroit, et al have committed acts amounting to de jure segregation of the Detroit public schools contained in the District Court's Ruling on the Issue of Segregation, and which directs the Board to submit a plan of desegregation and an appealable order?

The Defendants Board of Education contend "yes".

Defendants-Appellees, Cross-Appellants, the Board of Education for the City of Detroit, et al (hereinafter referred to as Board of Education) respectfully moves this Honorable Court to deny the Motion to Dismiss Appeals filed herein by Plaintiffs-Appellants and Cross-Appellees, for the reason that this Honorable Court has jurisdiction of this matter at this time because (1) the order appealed from by the Board of Education is a final order within the meaning of 28 U.S.C. 1291, or in the alternative, (2) is an appealable interlocutory order pursuant to 28 U.S.C. 1292 (a) (1).

In support of their prayer that the Motion to Dismiss should be denied as to their appeal, the Board of Education, et al show the following:

STATEMENT OF PROCEDURAL FACTS

Plaintiffs commenced this litigation filing a complaint on August 18, 1970 against the Board of Education of the City of Detroit, its members and the then Superintendent of Schools, as well as the Governor, Attorney General, State Board of Education and State Superintendent of Public Instruction of the State of Michigan. Plaintiffs challenged the constitutionality of Act 48 of the Public Acts of 1970 of the State of Michigan as it affected certain plans of the Detroit Board of Education, and also alleged that the Detroit Public School System was and is segregated on the basis of race as a result of the official policies and actions of the Board of Education. After making said allegations, the Plaintiffs in two and one-half pages of pleadings asked for certain relief including preliminary injunctions requiring the Board of Education to implement a plan of desegregation known as the "April 7, 1970" plan restraining implementation of the aforementioned Act No. 48 of Michigan Public Acts of 1970, restraining the Board of Education from all further school construction and requesting permanent decrees concerning the above, and enjoining the Board of Education from building schools, approv-

ing policies, curriculum and programs "which are designed to or have the effect of maintaining, perpetuating and supporting racial segregation in the Detroit School System" and ordering Defendant School Board to institute a plan of desegregation.

This case was initially tried on Plaintiffs' motion for preliminary injunction to restrain the enforcement of the aforementioned Act 48 so as to permit the so-called April 7, 1970 plan to be implemented. The trial court ruled that the Plaintiffs were not entitled to a preliminary injunction, did not rule on the constitutionality of Act 48, and granted a motion dismissing the cause as to all of the State Defendants.

This Court, in **Bradley v. Milliken**, 433 F. 2d 897, 989 (6th Cir. 1970), held that the Trial Court did not abuse its discretion in denying the motion for preliminary injunction, but, reversing the trial court in part, held that portions of Act 48 were unconstitutional and that the State Defendants should remain in the suit. By so doing, this Court recognized that at that time it had jurisdiction to hear the appeal, even though the matter was still pending in the lower court and there had not then been a trial on the merits.

Subsequently, the Plaintiffs sought to have the Trial Court direct the Defendant, Detroit Board, to implement the "April 7th" plan prior to trial. The Court did not order implementation of the "April 7th" plan, but, instead, adopted a plan submitted by the Board of Education.

Plaintiffs again appealed to this Court, and again, the Court held that the Trial Court had not abused its discretion in refusing to adopt the April 7, 1970 plan. This Court furthermore remanded with instructions to proceed immediately to a trial on the merits of Plaintiffs' allegations about the Detroit School System. **Bradley v. Milliken**, 438 F. 2d 946 (6th Cir. 1971). Again this Court did not question its jurisdiction to hear the second appeal, even though there had been no trial on the merits, but, instead,

denied Plaintiffs the relief sought on grounds other than jurisdictional.

The trial on the issue of segregation began April 6, 1971 and was concluded on July 22, 1971 after consuming 41 trial days.

On September 27, 1971, the Trial Court issued a "Ruling on Issue of Segregation" which is attached as Appendix A to the Plaintiffs' motion herein.

In that ruling at page 25 (see Appendix A of Plaintiffs' motion), the Court stated with particular finality:

> In conclusion, however, we find that both the State of Michigan and the Detroit Board of Education have committed acts which have been causal factors in the segregated condition of the public schools of the City of Detroit. As we assay the principles essential to a finding of de jure segregation, as outlined in rulings of the United States Supreme Court, they are: . . . "

And at page 34 of the ruling, the Court stated:

> "Having found a de jure segregated public school system in operation in the City of Detroit, our first step, in considering what judicial remedial steps must be taken . . . "

Pursuant to the above ruling, a pre-trial conference was held on Monday, October 4, 1971, the transcript of which has been attached to Plaintiffs' motion herein as Appendix B. As the transcript reveals the entire purport of the pre-trial conference on October 4, 1971 was directed towards a remedy implementing the Court's ruling.

This pre-trial conference concluded with the Court setting a time table for the presentation of proposed implementation

plans. Though counsel for Plaintiffs has suggested that at page 29 of the pre-trial transcript that the then counsel for the Board of Education waived the entering of an order, the Court did enter its order of November 5, 1971, which is attached to Plaintiffs' motion as Appendix C, set forth therein the time table for the presentation of plans, and confirmed that as far as the Trial Court was concerned, its findings of fact and conclusions of law on the issue of segregation had been made and were final.[1] Furthermore, in their motion now before this Court, the Plaintiffs at page 6 concede that the Defendants had the right to insist on an order being entered.

It is also noted that the Trial Court had previously issued an injunction prohibiting the Defendant School Board from constructing any new school buildings. That order still remains in effect and the Court has enforced it and intends to do so as the Court's attached letter marked Appendix J attached hereto indicates.

ARGUMENT

REASONS WHY THE MOTION TO DISMISS APPEAL SHOULD BE DENIED

INTRODUCTION

This Court has jurisdiction over the Appeal of Board of Education from the Order of November 5, 1971 either as a final decision under 28 U.S.C. 1291; as the term "final decision" has been interpreted by the United States Supreme Court, by the Court of Appeals for the Sixth Circuit and by other Circuits; 28 U.S.C. 1291 reads in part:

"The Courts of Appeals shall have jurisdiction of

---

[1] As to this confirmation, the Court's attention is directed to the Trial Court's language at the outset of its order of November 5, 1971: "The Court having entered its findings of fact and conclusions of law on the issue of segregation on September 27, 1971."

appeals from all final decisions of the district courts of the United States . . . "

If this Court does not deem the Order to be a "final decision" within the meaning of §1291, then the only possible alternative interpretation is that the Order is interlocutory and in the nature of an injunction from which appeals are permitted pursuant to 28 U.S.C. 1292(a) (1):

"(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;"

I.

THE ORDER OF NOVEMBER 5, 1971 IS A FINAL DECISION WITHIN THE MEANING OF 28 U.S.C. 1291 AS THE TERM "FINAL DECISION" HAS BEEN INTERPRETED BY THE UNITED STATES SUPREME COURT, 6TH CIRCUIT AND OTHER CIRCUITS.

It is ineluctable fact that none of the issues of fact or law raised in Plaintiffs' complaint or Defendants' answer remain before the Trial Court. All were disposed of by the "Ruling on Issue of Segregation" of September 27, 1971, and the subsequent order incorporating that Ruling on November 5, 1971. All that remains is to fashion a remedy.

These facts, by clear logic and ample precedent, allow only the conclusion that the above Ruling constitutes a "final decision" within the meaning of §1291, which is appealable at this time.

With regard to precedent, there is more significance to the cases Plaintiffs fail to cite than those they do cite.

Plaintiffs' sole reliance for all practical purposes is on **Taylor v. Board of Education**, 288 F. 2d 600 (2d Cir. 1961) in which the second circuit did hold that an order finding the existence of **de jure** segregation and mandating the school board to submit a desegregation plan was not appealable either as a final order, or as an interlocutory injunction within the meaning of 28 U.S.C. 1292(a) (1). The **Taylor** decision is distinguishable from the case at Bar, is not the law of the Sixth Circuit, has not been followed on this point by any other Circuit, and most importantly, preceded by approximately 14 months the decision of the United States Supreme Court of June 26, 1969 in **Brown Shoe Company v. United States**, 370 U.S. 294, in which the Supreme Court held that an appeal from an order analagous to the order in the case at Bar must be interpreted as a final appealable order.

There has been indication that the Second Circuit's position on this point is not broadly accepted for some time. The late Mr. Justice Jackson, in reversing another decision of the Second Circuit which had denied appealability on the grounds of lack of finality, indicated as much:

> "The only issue presented by this case turns on the finality of a judgment for purposes of appeal, a subject on which the volume of judicial writing already is formidable. The Court of Appeals resolved against finality of the decree in question, saying, however, that it did so against the unanimous conviction of the court as constituted but

> in deference to a precedent established by a differently constituted court of the same Circuit, 173 F. 2d 738. Because of this intracircuit conflict, we made a limited grant of certiorari. 338 U.S. 811. That we cannot devise a form of words that will settle this recurrent problem seems certain; but in this case we agree with the convictions of the court below and reverse its judgment." **Dickinson v. Petroleum Corporate Conversion Corporation**, 338 U.S. 507, at 508 (1950).

Thus, the Second Circuit itself has long been split on the question of finality, and the Supreme Court, long ago, became dubious of the Second Circuit's views on finality. This alone is good reason for this Court not to blindly follow the decision of a split Second Circuit panel in **Taylor.**

There is a factual distinction between **Taylor** and the case at Bar. As a practical matter, the order in **Taylor** involved, basically, desegregating one school in a suburban district. Here we are speaking of an entire school system, reputedly the fourth largest school district in terms of student enrollment in the United States. Unlike **Taylor**, leaving the rights of the parties undetermined now at the appellate level could result in a great disservice to over 290,000 school children.

Much more on point than the dubious **Taylor** case is the more recent pronouncement of the United States Supreme Court in **Brown Shoe Company v. United States**, 370 U.S. 294 (1969) which dictates that the November 5, 1971 order be interpreted as a final appealable decision.

Brown Shoe Company resulted from a complaint brought by the United States government alleging that the merger of Brown Shoe Company and Kinney Shoe Company was in violation of Section 15 of the Clayton Anti-Trust Act (15 U.S.C. 25). The District Court held that the Brown-Kinney merger did indeed

violate Section 15 and entered a judgment so concluding, but reserved ruling on divestiture until the filing of divestiture plans for doing so. The case reached the United States Supreme Court by direct appeal pursuant to the so-called Expediting Act, 15 U.S.C.A. Section 29, which permitted direct appeals in the event of "final judgment of the district court."

In holding that the judgment of the District Court could be interpreted as final, even though no plan for divestiture had been entered, the United States Supreme Court, speaking through Mr. Chief Justice Warren, said, beginning at 308:

> "(5) We think the decree of the District Court in this case had sufficient indicia of finality for us to hold that the judgment is properly appealable at this time. We note, first, that the **District Court disposed of the entire complaint filed by the Government. Every prayer for relief was passed** upon. Full divestiture by Brown of Kinney's stock and assets was expressly required. Appellant was permanently enjoined from acquiring or having any further interest in the business, stock or assets of the other defendant in the suit. **The single provision of the judgment by which its finality may be questioned is the one requiring appellant to propose in the immediate future a plan for carrying into effect the court's order of divestiture.** However, when we reach the merits of, and affirm, the judgment below, the sole remaining task for the District Court will be its acceptance of a plan for full divestiture, and the supervision of the plan so accepted. Further rulings of the District Court in administering its decree, facilitated by the fact that the defendants below have been required to maintain separate books **pendente lite**, are sufficiently independent of, and subordinate to, the issues presented by this appeal to make the case

in its present posture a proper one for review now. Appellant here does not attack the full divestiture ordered by the District Court as such; it is appellant's contention that under the facts of the case, as alleged and proved by the Government no order of divestiture could have been proper. **The propriety of divestiture was considered below and is disputed here on an 'all or nothing' basis. It is ripe for review now, and will, thereafter, be foreclosed.**

Repetitive judicial consideration of the same question in a single suit will not occur here. (Citations Omitted)

A second consideration supporting our view is the character of the decree still to be entered in this suit. **It will be an order of full divestiture. Such an order requires careful, and often extended, negotiation and formulation. This process does not take place in a vacuum,** but rather, in a changing market place, in which buyers and bankers must be found to accomplish the order of forced sale. The unsettling influence of uncertainty as to the affirmance of the initial, underlying decision compelling divestiture would only make still more difficult the task of assuring expeditious enforcement of the anti-trust laws. **The delay in withholding review of any of the issues in the case until the details of a divestiture had been approved by the District Court and reviewed here could well mean a change in market conditions sufficiently pronounced to render impractical or otherwise unenforceable the very plan of asset disposition for which the litigation was held. The public interest, as well as that of**

the parties, would lose by such procedure."
(emphasis added)

The analogy of **Brown Shoe Company** on the point of issue here to the case at Bar is clear. That **Brown** dealt with anti-trust law does not change the fact that it represents the true state of the law on this issue.

This becomes evident by noting the emphasized portions of the above quotation and comparing them to the facts in the instant case. Taken together, the September 27, 1971 Ruling and Order of November 5, 1971 answered, as in **Brown**, "every prayer for relief". The Plaintiffs did not prevail on the issue of segregation among faculty and administration. They prevailed on all other issues. As in the **Brown** case, the only matter left is the implementation and supervision of a remedy in accordance with the Trial Court's final conclusion on the issue of segregation. As in the **Brown** case, if this Court of Appeals affirms on the merits "the sole remaining task for the District Court will be its acceptance of a plan for a full divestiture, and the supervision of the plan so accepted". Here it will be the acceptance and supervision of a desegregation plan.

On the other hand, if this Court finds on appeal that the Trial Court erred in its Ruling on the Issue of Segregation, then there will be no need for a remedy.

As was the appellant in **Brown**, the Board of Education is in an "all or nothing" position. The School Board's position is that there should be no order of desegregation just as the appellant in **Brown** claimed there should be "no order of divestiture".

As in **Brown**, there will be no "repetitive judicial consideration" before this Court once this Court decides the basic segregation issue here which Defendants' appeal raises.

Just as Mr. Chief Justice Warren in **Brown** recognized that a divestiture order is a complicated order demanding time and consideration because of market conditions, likewise a desegregation order by its very nature is complex, not necessarily because of market conditions, but because of sociological, economic and changing population patterns which do require time. As in **Brown**, a delay here in withholding review will be contrary to the public's interest. If this Court finds no basis for remedy, then further action on remedy implementation is futile. If this Court finds that there is a basis for remedy, it will have established a firm footing for a remedy.

The Trial Court below seemed to merge the concept of **de facto** segregation with **de jure** segregation. The law of the Sixth Circuit is that a school board is not responsible for **de facto** segregation. **Deal v. Cincinnati Board of Education**, 419 F. 2d 1387 (1969). There is also recent indication that the United States Supreme Court recognizes that the Boards of Education are not responsible for **de facto** segregation. See the Court's summary order in **Spencer v. Kugler**, 40 L.W. 3329 (January 18, 1972).

We recognize that the Trial Court attempted to charge the Board of Education with **de jure** segregation, but this attempt was based on three isolated findings. One suggesting that the Board had in one instance bussed black pupils past a white school was not supported on the record for the bussing to the school involved was for physical facility reasons (newer school) rather than due to any attempt to segregate. The second finding concerned the Board's previous optional attendance zones, which the Trial Court itself found the Board had actively sought to eliminate, even hiring an expert to do so. (See page 13 – Ruling) The third isolated finding was a suggestion that in "at least one instance" the Board did build a school "which contains black students". We suggest that this is indeed an isolated instance in a school system of over three hundred school buildings with over 295,000 school children.

On the other hand, contrary to any other court decision in which a school board has been charged with **de jure** segregation, the Trial Court here, in effect, awarded the Board a **summa cum laude** degree in its efforts to advance integration. From page 18 through page 24 of its Ruling, the Trial Court spends considerable time setting forth the tremendous efforts which the School Board has expended in an effort to integrate. In fact, the Court begins its entire discussion at page 18 by the following words:

> "It would be unfair for us not to recognize the many fine steps the Board has taken to advance the cause of quality education for all in terms of racial integration and human relations. The most obvious of these is in the field of faculty integration."

The issue then is clearly drawn. Do isolated instances which the Trial Court has properly or improperly found to be discriminatory form a basis for a finding of **de jure** student segregation sufficient to support a comprehensive remedy when cast against the Trial Court's findings that the School Board has labored mightily to remove **de facto** segregation? This crucial issue, if decided in the School Board's favor, would be wholly dispositive of the case. If decided adversely to the School Board, it would not be susceptible to reargument in the hearings on proposed remedies. In either event, it is ripe for decision **now.**

The key, of course, is the practical interpretation of the word "final". The Court of Appeals for the Sixth Circuit has traditionally followed an enlightened view in interpreting the term "finality" in permitting appeals. Thus, in **Gillespie v. United Steel Corporation,** 321 F. 2d 518 (1963), this Court held that a motion striking all references to the statute of the State of Ohio, to unseaworthiness, or references to recovery

for the benefit of brothers and sisters of the decedent in an action for recovery under the Jones Act was an appealable final order.

In upholding the Sixth Circuit on the issue of finality, the United States Supreme Court in **Gillespie v. United States Steel Corporation**, 379 U.S. 148 at 150 said:

> "Under Section 1291 an appeal may be taken from any 'final order of a district court'. But as this court often has pointed out, a decision 'final' within the meaning of Section 1291 does not necessarily mean the last order possible to be made in a case . . .
>
> And our cases long have recognized that whether a ruling is 'final' within the meaning of Section 1291 is frequently so close a question that decision of that issue may either be supported with equally forceful arguments, and that it is impossible to devise a formula to resolve all marginal cases coming within might well be called the twilight zone of finality".

In a school segregation case, this Court in a short order denied a motion to dismiss an appeal from an order similar to the order here, **Board of Education of the City of Chattanooga v. Mapp** (filed January 20, 1961).

We appreciate that in **Taylor** the Circuit Court criticized this Court's decision in **Mapp**. But then again **Taylor** was before **Brown**. We also point out to the Court that although **Taylor** was called to the Fifth Circuit's attention, the Fifth Circuit went on to ignore **Taylor** and held that the ordering of a desegregation plan dealing expressly with prohibited acts amounted to a mandatory injunction and was appealable. The **Board of Public Instruction of Duval County v. Braxton**, 326

F. 2d 616, 619 (5th Cir. 1964).

The Sixth Circuit has been true to the philosophy of **Gillespie** as subsequently expressed in **Brown** in permitting appeals of final orders such as this including those in school segregation case. We invite the Court's attention to its decision in **Kelley v. Metropolitan Board of Education**, 436 F. 2d 856, 862 (6th Cir. 1970) where the Court upheld the appealability of an order saying "pupil integration proceedings for an indefinite time is appealable as a final order under 28 U.S.C. 1291."

Obviously in **Kelley**, the Court believed that the matter should be reviewed by the appellate court because of its importance to the parties involved. A similar view was taken by the Tenth Circuit in **Board of Education of Oklahoma City v. Dowell**, 375 F. 2d 158 (10th Cir. 1967) where that Court did not even question its jurisdiction in reviewing an order requiring a local board to submit a plan with certain specified features.

The practical approach in a case such as the case at Bar is to permit the appeals by recognizing that the November 5, 1971 order incorporated the September 27, 1971 ruling as a final appealable order. All the parties are entitled to know whether or not the lower court was correct in its decision just as the Plaintiff was permitted to find out even before trial whether Public Act 48 was constitutional, **Bradley v. Milliken**, 443 F.2d 897 (1970), and whether the Trial Court abused its discretion in not implementing the so-called April 7, 1970 plan. **Bradley v. Milliken**, 438 F. 2d 945 (6th Cir. 1971). The only difference now is that the order is final and it is Defendants seeking review.

It should be noted that the Plaintiffs-Appellees have also filed an appeal challenging the ruling of the Trial Court as to

faculty desegregation. If this Court of Appeals finds that Defendants' Board of Education appeal cannot be interpreted as a final order, the Court still is saddled with Plaintiffs' appeal. Since the ruling on that issue denied relief, it is as final a decision as is going to be made. There would be no logic to hearing only that portion of the case now. Thus, it becomes imperative in the interest of judicial economy that all appeals be heard at this time.

We suggest to the Court that the rights of students are just as important as the right of corporations which were involved in the **Brown** case and for this reason, these appeals should be heard by this Honorable Court at this time.

II.

EVEN IF THIS COURT DECIDES THAT THE ORDER IS NOT A FINAL ORDER, IT IS STILL APPEALABLE TO THIS COURT AS THE COURT HAS JURISDICTION UNDER 28 U.S.C. 1292 BECAUSE IT HAS THE EFFECT OF AN INJUNCTION.

If this Court should interpret the order of November 5, 1971 as not a final order that can be appealed under 28 U.S.C. 1291, it is the position of Defendants' Board of Education that the order entered by the District Court on November 5, 1971, is appealable to the United States Court of Appeals for the Sixth Circuit as a matter of right under 28 U.S.C. §1292(a) (1).

This statute is the direct descendant of the Evarts Act of 1891, 26 Stat. 828, which was designed to facilitate the appeals of certain interlocutory orders. The relevant portion of the statute, as currently in force, reads as follows:

"(a) The courts of appeals shall have jurisdiction of appeals from:

> (1) Interlocutory orders of the district courts of the United States, . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court; . . . "

28 U.S.C. §1292 (a) (1).

As interpreted by the courts and academic commentators, §1292 does not necessarily allow appeals of all orders which are labeled injunctions, nor does it preclude appeal of orders which are not labeled injunctions. Here, as elsewhere in the law, substance rules over form. The consensus of the judicial and academic authorities seems to be that §1292 permits appeals from the granting or denying of injunctive relief when that relief goes to the heart of the case, and is not merely incidental to the trial.

It is clear that the order which Defendant Board of Education is challenging gives some or all of the substantive relief sought by a complaint. In fact, it is not too much to say that the order goes to the heart of the case. The District Court, after finding against Defendants' Board of Education on the issue of **de jure** segregation, issued this order requiring the submission of a plan for desegregating the Detroit schools. The plan ordered is directed precisely to the ultimate relief sought by Plaintiffs.

Of course, the fact that the November 5, 1971 order was not stated in terms of prohibition does not affect the fact that it is an injunction. Mere labels are not decisive in determining whether an order is an "injunction" under §1292 (a) (1), and it is clear that mere words of prohibition are not an essential element of an injunction. In effect, Defendants' Board of Education has been prohibited, with all the sanctions available to the District Court, from **not** submitting a plan. Furthermore, the

Trial Court has enjoined the Board from engaging in any school construction and this injunction must be interpreted as part of the November 5, 1971 order.

Thus Courts of Appeals, in other cases involving the desegregation of schools, have recognized appealability of orders under §1292 (a) (1). For example, the Fifth Circuit concluded "that the ordering of a plan dealing expressly with these prohibited acts amounts to a mandatory injunction." **Board of Public Instruction of Duval County v. Braxton**, 326 F. 2d 616, 619 (5th Cir. 1964). The Fifth Circuit has also upheld the appealability under §1292 (a) (1) of an order "denying the plaintiff's motion to modify the plan." **Steele v. Board of Public Instruction of Leon County,** 371 F. 2d 395, 396 (5th Cir. 1967). See also **Board of Education of Oklahoma City v. Dowell**, 375 F. 2d 158 (10th Cir. 1967), where the Court did not even discuss the question of its jurisdiction to review a District Court order requiring a local board to submit a plan with certain specified features.

In all of these cases, the District Court's order was held appealable under §1292 (a) (1). In none of them was the order stated in prohibitory terms. In each case, the order concerned the preparation of a desegration plan, and the Courts of Appeals considered and decided the issues presented on appeal.

Following the lead of the Fifth Circuit and the Tenth Circuit, there is absolutely no reason why this Court of Appeals could, in the alternative, interpret the order of November 5, 1971 as appealable under Section 1292 (a) (1) as it is in the nature of an injunction. More importantly, the issue of segregation is now ripe for review.

CONCLUSION

Based upon the reasons set forth above, there is no question that the order of November 5, 1971 was properly appealed to this Court and this Court has jurisdiction in the matter as it was either a final decision within the meaning of 20 U.S.C. 1291 or an interlocutory appealable order within the meaning of 28 U.S.C. 1292 (a) (1).

Respectfully submitted,

RILEY AND ROUMELL

By: GEORGE T. ROUMELL, JR. /s/
George T. Roumell, Jr.
Attorneys for Defendants
Board of Education for the
City of Detroit, et al

Dated: February 3, 1972

APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
BAY CITY, MICHIGAN 48708

Chambers of
Stephen J. Roth
District Judge

January 25, 1972

Mr. Louis D. Beer
Riley and Roumell
7th Floor Ford Building
Detroit, Michigan 48226

RE: Civil Action No. 35257,
Bradley v. Milliken,
et al.

Dear Mr. Beer:

I have read your letter of January 20th respecting proposed modifications of the "construction" injunction of the court in the above entitled matter. I consider it better practice in such matters to make a motion for the amendment of the injunction. I suggest that a motion be brought for that purpose and that the matter be noticed for the morning of February 10, 1972, at any time convenient to counsel. If there is no opposition, as seems to be the present indication, you or someone from your office, may simply appear and present the necessary orders for my signature.

Very truly yours,

Stephen J. Roth

SJR:bjg

XC: All counsel of record:
Mr. Lucas
Mr. Ritchie
Mr. Sachs
Mr. Krasicky

FILE COPY

FILED
JUN 16 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1463

WILLIAM J. MILLIKEN, *et al.*,

Petitioners,

vs.

RONALD BRADLEY, *et al.*

BRIEF IN OPPOSITION TO CERTIORARI

JACK GREENBERG
NORMAN J. CHACHKIN
10 Columbus Circle
New York, New York 10019

E. WINTHER MCCROOM
3245 Woodburn Avenue
Cincinnati, Ohio 45207

BRUCE MILLER
LUCILLE WATTS
3246 Cadillac Towers
Detroit, Michigan

LOUIS R. LUCAS
WILLIAM E. CALDWELL
525 Commerce Title Bldg.
Memphis, Tennessee 38103

NATHANIEL R. JONES
1790 Broadway
New York, New York 10019

J. HAROLD FLANNERY
PAUL R. DIMOND
ROBERT PRESSMAN
38 Kirkland Street
Cambridge, Mass. 02138

Attorneys for Respondents
Ronald Bradley, et al.,
Plaintiffs Below

INDEX

PAGE

Opinions Below 1

Jurisdiction 1

Question Presented 2

Statement 2

The First Appeal Below 2

The Second Appeal 3

The Third Appeal 4

Subsequent Proceedings in the District Court 5

REASONS FOR DENYING THE WRIT—

I. Considerations of Practicality and Sound Judicial Administration as Well as the Strong Federal Policy Against Piecemeal Appeals Expressed in 28 U.S.C. §1291 Compel Denial of the Writ 6

A. It is Highly Likely That the Question Will be Mooted Before This Court Reaches the Merits 6

B. Piecemeal Review Is Particularly Inappropriate in School Desegregation Cases 7

C. The Ruling Below Correctly Applies the Decisional Law of This Court in Interpreting 28 U.S.C. §1291 as to the Jurisdiction of the Courts of Appeals 10

PAGE

II. Assuming *Arguendo* That the Court of Appeals Had Jurisdiction, This Court Should Not Review the Substantive Issues Before the Court of Appeals Has the Opportunity to Rule 15

CONCLUSION 18

TABLE OF AUTHORITIES

Cases:

Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969) 7, 12

Bohms v. Gardner, 381 F.2d 283 (8th Cir. 1967) 11
Borough of Ford City v. United States, 345 F.2d 645 (3d Cir.), cert. denied, 382 U.S. 902 (1965) 11
Bradley v. Milliken, 433 F.2d 897 (6th Cir. 1970) 3
Bradley v. Milliken, 438 F.2d 945 (6th Cir. 1971) 13
Bradley v. Milliken, 338 F. Supp. 582 (E.D. Mich. 1971) 1
Brown Shoe Co. v. United States, 370 U.S. 294 (1962) 11, 12n, 16

Calhoun v. Cook, 451 F.2d 583 (5th Cir. 1971) 9
Clark v. Kraftco Corp., 447 F.2d 933 (2d Cir. 1971) 15
Cooper v. Aaron, 358 U.S. 1 (1958) 8n
Corpus Christi Independent School Dist. v. Cisneros, 404 U.S. 1211 (1971) 12
Corpus Christi Independent School Dist. v. Cisneros, Misc. No. 1746 (5th Cir., July 10, 1970) 13

Firestone Tire & Rubber Co. v. General Tire & Rubber Co., 431 F.2d 1199 (6th Cir. 1970) 15n

PAGE

Franklin v. Quitman County Bd. of Educ., 443 F.2d 909 (5th Cir. 1971) 10

Gillespie v. United States Steel Corp., 370 U.S. 148 (1964) 13, 14, 14n, 15n
Griffin v. County School Bd., 377 U.S. 218 (1964) 8n

Joseph F. Hughes & Co. v. United Plumbing & Heating Co., 390 F.2d 629 (6th Cir. 1968) 15n

Kelley v. Metropolitan County Bd. of Educ., 436 F.2d 856 (6th Cir. 1970) 15n
Keyes v. School Dist. No. 1, Denver, 445 F.2d 990 (10th Cir. 1971), cert. granted, 404 U.S. 1036 (1972) 13
Keyes v. School Dist. No. 1, Denver, 313 F. Supp. 61, 90 (D. Colo. 1970) 13
Keyes v. School Dist. No. 1, 303 F. Supp. 279 (D. Colo. 1969) 13

Leonard v. Socony-Vacuum Oil Co., 130 F.2d 535 (7th Cir. 1942) 11

Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62 (1948) 11
Russell v. Barnes Foundation, 136 F.2d 649 (3d Cir. 1943) 10

Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) 10n, 12
Swann v. Charlotte-Mecklenburg Bd. of Educ., 431 F.2d 138 (4th Cir. 1970), rev'd 402 U.S. 1 (1971) 13
Swann v. Charlotte-Mecklenburg Bd. of Educ., 311 F. Supp. 265 (E.D. N.C. 1970) 13
Swann v. Charlotte-Mecklenburg Bd. of Educ., 300 F. Supp. 1358 (E.D. N.C. 1969) 13

PAGE

Taylor v. Board of Educ. of New Rochelle, 288 F.2d 600 (2d Cir. 1961) 9, 13, 15, 16
The Palmyra, 10 Wheat. (23 U.S.) 502 (1825) 10

United States v. Easement and Right-of-Way, 386 F.2d 769 (6th Cir. 1967) 15n
United States v. Texas Education Agency, 431 F.2d 1313 (5th Cir. 1970) 15n

Statutes:

28 U.S.C. §1254(1) 1

28 U.S.C. §1291 ..... 5, 6, 7, 10, 15

28 U.S.C. §1292(b) 13, 14n

Rules:

F.R.C.P. 54(b) 6

F.R.C.P. 56(c) 11

F.R.C.P. 56(d) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1463

WILLIAM J. MILLIKEN, *et al.*,

Petitioners,

—vs.—

RONALD BRADLEY, *et al.*

BRIEF IN OPPOSITION TO CERTIORARI

Opinions Below

Since the filing of the Petition for a Writ of Certiorari, the September 27, 1971 opinion of the district court, which was the subject of the appeal dismissed below, has been reported at 338 F. Supp. 582.

Neither the Court of Appeals' order of dismissal nor the rulings of the district court issued subsequent thereto have yet been reported; the prior opinions of the Court of Appeals are reported at 433 F.2d 897 and 438 F.2d 945.

Jurisdiction

This Court has jurisdiction of this case pursuant to 28 U.S.C. §1254(1).

Question Presented

A single question is properly presented by this case: whether the Court of Appeals erred in dismissing Petitioners' appeal from an interlocutory district court order requiring them to submit a desegregation plan for the court's consideration in the further stages of the litigation, when none of the Petitioners nor any other party was thereby enjoined to take any acts directly affecting the operation of the schools or the assignment of pupils and when important issues affecting the scope and content of any subsequent district court order remained to be resolved.

Statement

This is a school desegregation case which was commenced August 18, 1970 against the Superintendent of Schools and Board of Education of the City of Detroit, the Governor, Attorney General, State Board of Education and the State Superintendent of Public Instruction of Michigan. The present Petition for a Writ of Certiorari is filed only by the State defendants, although a Brief in Support of the Petition has been submitted by a group of Respondent school districts located outside Detroit which were permitted to intervene as defendants in the district court.

The First Appeal Below

This litigation was filed a month and a half after the Michigan Legislature enacted a statute, described by the Court below in an earlier decision as "unconstitutional and of no effect as violative of the Fourteenth Amendment," which "thwarted, or at least delayed," implementation of a reassignment plan designed to achieve greater desegregation in Detroit's high schools which had been adopted by

the Detroit Board of Education on April 7, 1970. *Bradley v. Milliken*, 433 F.2d 897, 904 (6th Cir. 1970). The complaint accordingly prayed that a preliminary injunction issue against the operation of the statute and that implementation of the April 7, 1970 plan be directed.[1]

The complaint further alleged that the public schools of Detroit were being operated on a racially segregated basis as a result of historic policies, practices and actions of State authorities. It sought appropriate permanent relief requiring the dissolution of the segregated system and elimination of racially identifiable schools.

The district court initially denied the motion for preliminary injunction, but its ruling was reversed by the Court of Appeals, which held the statute unconstitutional. 433 F.2d 897.

The Second Appeal

On remand, the plaintiffs sought again to require the immediate implementation of the April 7 Plan as a matter of interim relief to remedy the mischief created by the enactment of the unconstitutional statute, without determination of the more general issues raised in the complaint. The district court permitted the Detroit Board of Education to propose alternative plans and approved one of them; plaintiffs again appealed, but the Court below remanded the matter "with instructions that the case be set forthwith and heard on its merits," stating:

> The issue in this case is not what might be a desirable Detroit school plan, but *whether or not there*

[1] Following adoption of the April 7, 1970 desegregation plan, a majority of the members of the Detroit Board of Education were recalled by the electorate and their positions filled by subsequent appointment by the Governor of Michigan.

> *are constitutional violations* in the school system as presently operated, *and if so, what relief is necessary* to avoid further impairment of constitutional rights.

438 F.2d 945, 946 (6th Cir. 1971) (emphasis supplied).

The Third Appeal

An extensive trial consumed most of the spring and summer of 1971 and on September 27, 1971, the district court issued Findings of Fact and Conclusions of Law, 338 F. Supp. 582, in which it concluded that the racial segregation in the Detroit public schools was not accidental but rather the product of a panoply of racially discriminatory actions by federal, state and local authorities, educational and other, combined with acts and results of private discrimination. The court scheduled a pretrial conference to discuss further proceedings with counsel,[2] at which time the Detroit Board of Education and the Michigan State Board of Education were orally directed to submit proposed plans of desegregation. At the request of the State defendants, the district court on November 5, 1971 reduced its oral instructions to the parties to a written Order (see Appendix to Petition for Writ of Certiorari, pp. 29a-30a). On December 3, 1971, the Detroit

---

[2] A group of Detroit parents who had intervened in the proceedings had filed a motion seeking to join as parties other school districts surrounding Detroit so that the Court might fashion relief involving the exchange of pupils in such districts and the Detroit district. The lower court declined to pass upon this motion in its September 27 ruling but did later direct the State Board of Education to submit a metropolitan plan of desegregation for the court's consideration, as well as permit intervention by 43 school districts outside Detroit.

Board of Education and the Petitioners filed Notices of Appeal from the Order of November 5, 1971.[3]

On January 25, 1972, plaintiffs filed a Motion to Dismiss Appeals (which had been docketed in the Sixth Circuit on January 24) on the ground that the Court of Appeals lacked jurisdiction pursuant to 28 U.S.C. § 1291 since the Order of November 5, 1971 could not be construed as a final order. After response by all parties, the Court of Appeals entered the order of which review is sought on February 22, 1972.

Subsequent Proceedings in the District Court

Following issuance of its Order of November 5, 1971 and since dismissal of Petitioners' appeal, the district court has pursued further proceedings in this matter looking toward the shaping of an appropriate remedial decree for the constitutional violations it found to exist. The court has considered desegregation plans limited to the City of Detroit and not so limited; it has permitted intervention in the proceedings by a large number of school districts outside the City of Detroit; it has held exhaustive hearings this spring; it has received extensive proposed findings of fact and conclusions of law on the remedy issue; and it has issued various interlocutory rulings and opinions of law (see Appendix to Petition, pp. 31a-43a) but no order, injunction or judgment. The matter is now awaiting the court's decision and the formulation of an equitable decree—a final order in this litigation.

---

[3] On December 11, 1971, plaintiffs below filed a Notice of Appeal from the November 5 Order of the district court limited to the correctness of the district court's findings in the September 27, 1971 opinion on the subject of faculty segregation. In the Motion to Dismiss the Detroit Board's and Petitioners' appeals filed in the Court below, plaintiffs questioned the viability of their own appeal and consented to its dismissal as well if their motion were granted.

REASONS FOR DENYING THE WRIT

I.

Considerations of Practicality and Sound Judicial Administration as Well as the Strong Federal Policy Against Piecemeal Appeals Expressed in 28 U.S.C. §1291 Compel Denial of the Writ.

A. It is Highly Likely That the Question Will Be Mooted Before This Court Reaches the Merits.

Petitioners sought to appeal from an interlocutory order of the district court which required nothing more than that they prepare and submit to the court a plan of desegregation—an order so clearly considered by the district judge to be one concerned only with the manner of proceeding in the litigation that it was not reduced to writing except upon the request of counsel for Petitioners. *Compare* F.R.C.P. 54(b) (express direction for entry of judgment is predicate of appealability). Petitioners' appeals were dismissed by the Court below on February 22, 1972; the Petition for a Writ of Certiorari was docketed here May 9, 1972, seeking reversal of the Sixth Circuit's order dismissing the appeals because the district court decree was not final. Thus, should Petitioners prevail in this Court, the Court of Appeals' Order of Dismissal will be vacated and the matter restored to its docket for submission of briefs by the parties and oral argument.

Such a course of action is clearly unnecessary to protect Petitioners' right to review, and, indeed, events are likely to overtake this Court's process so as to require the dismissal of the Writ, if granted. For during the course of the proceedings in the Court of Appeals and here, the litigation of this matter before the district court has con-

tinued. A set of hearings nearly as lengthy as those of the summer of 1971, which resulted in the district court's Memorandum Opinion finding unlawful segregation in the public schools, was held this spring on the issue of the appropriate remedy for such segregation and the entire matter is now under advisement before the district court, which has indicated that it would attempt to render its decision prior to the 1972-73 school year.

Thus, even if this Court were to grant the Petition, there is substantial likelihood that the district judge will shortly have entered a final order into which its prior rulings would be merged and from which Petitioners could, if dissatisfied, prosecute an appeal to the Sixth Circuit and litigate all of the issues they now seek to litigate in this Court.

In the circumstances of this case, therefore, favorable consideration of the Petition by this Court is unlikely to afford Petitioners any greater protection of their rights than denial.

B. Piecemeal Review Is Particularly Inappropriate in School Desegregation Cases.

The usual policy against piecemeal review (given expression in 28 U.S.C. §1291) is particularly suited and essential in school desegregation cases. Not only are the issues of violation and remedy interrelated, but the immediacy requirements of *Alexander* v. *Holmes County Bd. of Educ.*, 396 U.S. 19 (1969) weigh heavily against encouraging delay by fragmented appeals. Against the generalized claim advanced by Petitioners that the public interest would be served by a determination on the matter

of liability[4] (Petition, at p. 12) must be placed the interest of black schoolchildren who are discriminated against and the public interest in the constitutional operation of the schools.

The considerations peculiar to school desegregation cases were enunciated by Chief Judge Friendly of the United States Court of Appeals for the Second Circuit in 1961; his words bear quotation here:

> There is a natural reluctance to dismiss an appeal in a case involving issues so important and evocative of emotion as this, since such action is likely to be regarded as technical or procrastinating. Although we do not regard the policy question as to the timing of appellate review to be fairly open, we think more informed consideration would show that the balance of advantage lies in withholding such review until the proceedings in the District Court are completed. To stay the hearing in regard to the remedy, as appellants seek, would produce a delay that would be unfortunate unless we should find complete absence of basis for any relief—the only issue that would now be open to us no matter how many others might be presented, since we do not know what the District Judge will order—and if we should so decide, that would hardly be the end of the matter. On the other hand, to permit

[4] This is an intriguing argument: the district court here initially denied relief sought by the plaintiffs on two occasions without similar public outcry and was only persuaded after an extensive trial. Yet, whipped by emotional appeals of office-seekers, the public is said to be so aroused that compliance with the Judicial Code is characterized as "profoundly inimical to the public interest." The history of school desegregation teaches that even the most carefully considered rulings of this Court do not escape the same reaction and manipulation. See *Swann, supra*, 402 U.S. at 13; *Cooper* v. *Aaron*, 358 U.S. 1 (1958); *Griffin* v. *County School Bd.*, 377 U.S. 218 (1964).

> a hearing on relief to go forward in the District Court at the very time we are entertaining an appeal, with the likelihood, if not indeed the certainty, of a second appeal when a final decree is entered by the District Court, would not be conducive to the informed appellate deliberation and the conclusion of this controversy with speed consistent with order, which the Supreme Court has directed and ought to be the objective of all concerned. In contrast, prompt dismissal of the appeal as premature should permit an early conclusion of the proceedings in the District Court and result in a decree from which defendants have a clear right of appeal, and as to which they may seek a stay pending appeal if so advised. We—and the Supreme Court, if the case should go there—can then consider the decision of the District Court, not in pieces but as a whole, not as an abstract declaration inviting the contest of one theory against another, but in the concrete. We state all this, not primarily as the reason for our decision not to hear an appeal at this stage, but rather to demonstrate what we consider the wisdom embodied in the statutes limiting our jurisdiction, which we would be bound to apply whether we considered them wise or not.

Taylor v. *Board of Educ. of New Rochelle*, 288 F.2d 600, 605-06 (2d Cir. 1961). *See also, Calhoun* v. *Cook*, 451 F.2d 583 (5th Cir. 1971) (retaining jurisdiction of appeal and remanding to permit plaintiffs to put on evidence as to feasible plan of desegregation).

Finally, we are confident that we need not emphasize to this Court the considerations of judicial economy which support the decision below. These are particularly appropriate in school desegregation cases, which necessarily are

given some priority of treatment (*see, e.g., Franklin* v. *Quitman County Board of Education*, 443 F.2d 909 n. 1 (5th Cir. 1971)) and which already result in significant litigation in the Court of Appeals.[5]

C. The Ruling Below Correctly Applies the Decisional Law of This Court in Interpreting 28 U.S.C. §1291 as to the Jurisdiction of the Courts of Appeals.

We have made the point above that this is not a particularly compelling case for the exercise of this Court's certiorari jurisdiction since a decision by this Court is likely to have little practical impact and since piecemeal review is especially unsuited to school desegregation cases. We argue in this section that Petitioners' legal arguments are likewise unconvincing; rather, the Court below reached a correct result after weighing the factors delineated by the decisions of this Court affecting the issue of finality, and the two cases cited by Petitioners fail to support their contentions.

We begin with the fact that the Order of November 5, 1971 required only that the Michigan State Board of Education and the Board of Education of the City of Detroit submit desegregation plans for the further consideration of the district court. No injunction was entered at that time affecting the daily operation of the schools or the assignment of pupils. Thus, the order was akin to a grant of partial judgment on the issue of liability alone, which is not appealable. *E.g., The Palmyra*, 10 Wheat. (23 U.S.) 502 (1825) (Marshall, C.J.); *Russell* v. *Barnes Foundation*, 136 F.2d

---

[5] In *Swann, supra*, this Court noted that the Fifth Circuit had considered 160 appeals in school desegregation cases in less than one preceding year. 402 U.S. at 14. In 1971, the Sixth Circuit considered and decided cases from Detroit, Kalamazoo, and Pontiac, Michigan; Nashville, Knoxville, Memphis, Jackson, Shelby County and Madison County, Tennessee, involving school desegregation.

649 (3d Cir. 1943); *Borough of Ford City* v. *United States*, 345 F.2d 645, 647 (3d Cir.), *cert. denied*, 382 U.S. 902 (1965); *Leonard* v. *Socony-Vacuum Oil Co.*, 130 F.2d 535 (7th Cir. 1942); *see* cases cited by Mr. Justice Frankfurter in *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 68 (1948). *And see* F.R.C.P. 56(c) (interlocutory summary judgment on liability); F.R.C.P. 56(d) (partial summary judgment).

The general principles affecting the determination of finality were cogently summarized by Mr. Justice Blackmun in *Bohms* v. *Gardner*, 381 F.2d 283, 285 (8th Cir. 1967), wherein the Eighth Circuit dismissed an appeal from an order remanding a social security benefit determination to the Secretary of HEW because the lower court's order

> . . . neither granted nor denied the relief the claimant seeks . . . Thus, in the words of Catlin v. United States, supra, [324 U.S. 229 (1945)] the litigation had not reached its end on the merits and there is more for the court to do than execute the judgment, or, as Judge Ridge said, in Smith v. Sherman, supra, p. 551 of 349 F.2d, the district court's action by no means was "the last word of the law."

The instant case is not at all akin to *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962), cited by Petitioners. In that decision, Mr. Chief Justice Warren writing for the Court held that a direct appeal under the Expediting Act (15 U.S.C. §29) was properly taken from an order granting relief in an antitrust case including divestiture, even though the details of a plan to accomplish this divestiture remained to be devised and submitted to the district court for approval. The Court relied upon three factors: (1) the order disposed of the entire case, including every prayed for relief—while ultimate divestiture was

ordered, several specific injunctions were also issued (370 U.S. at 308); (2) delay in reviewing the matter could result in harm to the parties and the public interest because market conditions might change during the pendency of an appeal in such a fashion as to prevent an already formulated and approved plan of divestiture from being functional (370 U.S. at 309); and (3) the practice in the past, although not controlling, had been to accept such appeals, usually without discussion of finality (*ibid.*).[6]

Each of these factors, considered in the present case, militates against treating the district court's decree of November 5, 1971 as a final order. In the first place, every claim for relief was not passed upon. And far more remained to be done than just the formulation of a plan to effectuate a complex commercial transaction; indeed, serious substantive legal issues concerning the nature and scope of the available remedy remained to be passed upon. *See Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). Second, there is no danger of irreparable injury to any party by delay of the appeal; the dismissal of the appeals below hardly forecloses the issue whether the "Court of Appeals, and ultimately this Court should review this matter before hundreds of thousands of school children are loaded onto school buses [etc.]" (Petition, p. 11). *See Corpus Christi Independent School Dist.* v. *Cisneros*, 404 U.S. 1211 (1971) (Mr. Justice Black); *compare Alexander* v. *Holmes County Bd. of Educ., supra.*[7]

[6] So far as counsel for these Respondents are aware, this Court has never cited *Brown Shoe* to justify its acceptance of an appeal from an interlocutory decree in any but antitrust cases.

[7] We here express no view on the propriety of staying whatever remedial order may be entered by the district court, but merely point out that Petitioners will have an adequate opportunity to litigate that question when such an order is in fact entered. Since the order has not yet been entered, the effective date of any relief is as yet unknown.

Finally, the settled course of practice (and with good reason, see §B, *supra*) in school desegregation cases has been for appellate courts to consider rulings on the questions of liability and appropriate remedy together.[8] *Taylor* v. *Board of Educ. of New Rochelle*, 288 F.2d 600 (2d Cir. 1961); *Corpus Christi Independent School Dist.* v. *Cisneros*, Misc. No. 1746 (5th Cir., July 10, 1970) (refusing interlocutory appeal pursuant to 28 U.S.C. §1292(b)); *Bradley* v. *Milliken*, 438 F.2d 945 (6th Cir. 1971). Most litigants have followed this practice; for example, appeals challenging the findings of liability in *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 300 F. Supp. 1358 (E.D.N.C. 1969) and *Keyes* v. *School Dist. No. 1, Denver*, 303 F. Supp. 279 (D. Colo. 1969), 313 F. Supp. 61 (D. Colo. 1970) were not filed until after remedial decrees had been formulated, *see Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 311 F. Supp. 265 (E.D.N.C. 1970); *Keyes* v. *School District No. 1, Denver*, 313 F. Supp. 90 (D. Colo. 1970). *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 431 F.2d 138 (4th Cir. 1970), *rev'd* 402 U.S. 1 (1971); *Keyes* v. *School Dist. No. 1, Denver*, 445 F.2d 990 (10th Cir. 1971), *cert. granted*, 404 U.S. 1036 (1972).

We recognize with Petitioners that a final order "'does not necessarily mean the last order possible to be made in a case,' *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, at 152 (1964)." (Petition at p. 12). Indeed, the law of finality was infused with a necessary flexibility by the de-

[8] While Petitioners represent that double appeals will not require "repetitive judicial consideration of the same question," (Petition at p. 11), since the constitutional violation and the remedy are interdependent, *see Swann* v. *Charlotte-Macklenburg Bd. of Educ.*, 402 U.S. at 16, the Court of Appeals would of necessity be reviewing the same evidence in passing upon the appropriateness of a remedial decree as it had considered in passing upon the correctness of the liability ruling.

cision in *Gillespie*.[9] It does not, however, support Petitioners' claims in this case.

Petitioners fail to observe that the holding in *Gillespie*, which affirmed a determination by the court below in another case to accept, rather than dismiss, an appeal on its merits, does not remove the requirement of finality. As the Second Circuit has put it:

> . . . All that the Court decided in *Gillespie* was that a court of appeals has the power to review an order in a "marginal" case within the "twilight zone of finality" where the questions presented on appeal are fundamental to the further conduct of the case" and "the inconvenience and costs of piecemeal review" are outweighed by "the danger of denying justice by delay." 379 U.S. at 152-154, 85 S.Ct. at 311-312. Difficult questions of appealability may require a court of appeals to review the entire record in detail. *Gillespie* recognizes the judicial inefficiency inherent in reviewing an entire appeal and then deciding that the court of appeals cannot act because it does not have jurisdiction. See Green v. Wolf Corp., 406 F.2d 291, 302 (2d Cir. 1968), cert. denied, 395 U.S. 977, 89 S.Ct. 2131, 23 L.Ed.2d 766 (1969); 9 J. Moore, Federal Practice ¶¶110.12 (2d ed. 1970). However, the power recognized in *Gillespie* should be used sparingly, and we do not believe that this is a proper case for its exercise.

---

[9] *Gillespie* effectively allows the Court of Appeals to relieve a party from the consequences of failing to seek or obtain a certificate pursuant to 28 U.S.C. §1292(b) authorizing interlocutory appeal, where irreparable harm would otherwise result.

Clark v. *Kraftco Corp.*, 447 F.2d 933, 935-36 (2d Cir. 1971).[10]

We think, then, that the Court of Appeals was right in dismissing the appeal below because even if the lack of finality of the November 5, 1971 decree is considered open to question, there is no realistic danger of denying justice by delay which would compel review under *Gillespie*.

II.

Assuming *Arguendo* That the Court of Appeals Had Jurisdiction, This Court Should Not Review the Substantive Issues Before the Court of Appeals Has the Opportunity to Rule.

If the court below was correct in dismissing Petitioners' appeals because the November 5, 1971 order of the District court was not final within the meaning of 28 U.S.C. §1291, that is the end of the matter. Even if this Court should accept Petitioners' contentions as to appealability, however, the matter should be remanded for consideration on the merits by the Court of Appeals and the grant of certiorari limited to the first question presented in the Petition.

Inasmuch as the Court of Appeals has not considered the second or third questions in the Petition, it has entered

---

[10] A brief review of other decisions of the Sixth Circuit dealing with this issue will demonstrate convincingly that the Court properly applies the pragmatic tests endorsed in *Gillespie*. *See United States* v. *Easement and Right-of-Way*, 386 F.2d 769, 770 (6th Cir. 1967); *Joseph F. Hughes & Co.* v. *United Plumbing & Heating, Inc.*, 390 F.2d 629, 630 (6th Cir. 1968); *Firestone Tire & Rubber Co.* v. *General Tire & Rubber Co.*, 431 F.2d 1199, 1200 (6th Cir. 1970); *Kelley* v. *Metropolitan County Bd. of Educ.*, 436 F.2d 856, 862, (6th Cir. 1970) (citing *Gillespie*, and holding appealable a stay order which halted proceedings to devise a remedy for unconstitutional school segregation). *Accord, United States* v. *Texas Education Agency*, 431 F.2d 1313 (5th Cir. 1970).

no judgment thereon and this Court could review the issues only directly from the district court, see Rule 20 of the Supreme Court Rules.

Petitioners do not discuss the reasons which might justify such an exceptional exercise of this Court's certiorari jurisdiction; both logic and precedent argue against review of these questions at this time.

The same practical considerations outlined by Judge Friendly in *Taylor* v. *Board of Educ. of New Rochelle, supra* (see pp. 8-9 above) apply with added force to the determination whether to utilize an extraordinary procedure which "deprives . . . this Court of the benefit of consideration by a Court of Appeals." *Brown Shoe Co.* v. *United States, supra,* 370 U.S. at 355 (Mr. Justice Clark, concurring). The vital role which the Court of Appeals could play in resolving factual disputes and narrowing the issues is apparent from the nature of this case and of the primarily factual questions presented in the Petition. Underlining these points is the fact that the 1971 trial on the constitutional violation in this case was the longest such hearing in a school desegregation case insofar as these Respondents are aware;[11] the finding of unlawful segregation made by the district court resulted from the analysis and sifting of an extraordinary record, and review of its conclusion will require an equally burdensome and time-consuming investigation by an appellate court. But this Court sits primarily to correct legal, not factual errors.

Petitioners assert that if the writ issues "they can demonstrate *through thorough analysis of the testimony and exhibits,* that the findings of fact made below—insofar as they seem to support a finding of de jure segregation—

---

[11] The trial lasted 41 days, produced 4,710 pages of transcript and 408 trial exhibits.

are clearly erroneous, F.R.C.P. 52(a)." (Petition, pp. 12-13) (emphasis supplied). Passing upon such claims is the archetypal function of the Courts of Appeals.[12]

At most, the district court's opinion of September 27, 1971—the basis of its November 5, 1971 order—determines only the accountability of state and local educational authorities for constitutional violations. It prescribes no remedy and requires no metropolitan desegregation to be effectuated. As to the issue of metropolitan desegregation, the district court's rulings of March 24 and March 28, 1972 (Appendix to Petition, pp. 31a-43a) are expressions of opinion, but no orders or judgments have been entered. All of the considerations discussed above apply with added force to the desirability of denying review of the third question. While there may be occasions when the importance of an issue merits dispensing with intermediate appellate review (see cases cited in Rule 20 of the Supreme Court Rules), it is hardly conceivable that this Court can render anything but advisory pronouncements if it is to bypass the district court as well, as Petitioners and other Respondents suggest.

[12] This case bears little resemblance to those cited by the other Respondents in which review prior to judgment in the Court of Appeals was granted; each of those involved a substantial legal issue plainly presented, usually of major importance to the continued operation of a federal statute or other national program, in a context shorn of significant factual dispute.

CONCLUSION

WHEREFORE, for the foregoing reasons, these Respondents respectfully pray that the Petition for a Writ of Certiorari be denied.

JACK GREENBERG
NORMAN J. CHACHKIN
10 Columbus Circle
New York, New York 10019

E. WINTHER MCCROOM
3245 Woodburn Avenue
Cincinnati, Ohio 45207

BRUCE MILLER
LUCILLE WATTS
3246 Cadillac Towers
Detroit, Michigan

LOUIS R. LUCAS
WILLIAM E. CALDWELL
525 Commerce Title Bldg.
Memphis, Tennessee 38103

NATHANIEL R. JONES
1790 Broadway
New York, New York 10019

J. HAROLD FLANNERY
PAUL R. DIMOND
ROBERT PRESSMAN
38 Kirkland Street
Cambridge, Mass. 02138

Attorneys for Respondents
Ronald Bradley, et al.,
Plaintiffs Below

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1971

No. 71-1463

Supreme Court, U. S.
FILED
JUN 20 1972
MICHAEL RODAK, JR., CLERK

WILLIAM J. MILLIKEN, Governor of the State of Michigan; [illegible] member of the Michigan State Board of Education; FRANK J. KELLEY, Attorney General of the State of Michigan; MICHIGAN STATE BOARD OF EDUCATION, a constitutional body corporate, and JOHN W. PORTER, Superintendent of Public Instruction, Department of Education of the State of Michigan,

Petitioners,

-vs-

RONALD BRADLEY and RICHARD BRADLEY, by their Mother and

(Continued on Inside Front Cover)

SUPPLEMENTAL JOINT APPENDIX

FRANK J. KELLEY
Attorney General

ROBERT A. DERENGOSKI
Solicitor General

EUGENE KRASICKY
Assistant Attorney General

STEWART H. FREEMAN
Assistant Solicitor General

Counsel for Petitioners
525 W. Ottawa Street
Lansing, Michigan 48913

BUTZEL, LONG, GUST, KLEIN & VAN ZILE
John B. Weaver
Robert M. Vercruysse,
Of Counsel

WILLIAM M. SAXTON
1881 First National Building
Detroit, Michigan 48226

Counsel for Respondents Allen Park Public Schools, et al, Southfield Public Schools and School District of the City of Royal Oak

HILL, LEWIS, ADAMS, GOODRICH & TAIT
Robert B. Webster,
Of Counsel

DOUGLAS H. WEST
3700 Penobscot Building
Detroit, Michigan 48226

CONDIT AND MC GARRY, P.C.
Richard P. Condit,
Of Counsel

Counsel for Respondent Grosse Pointe Public Schools

HARTMAN, BEIER, HOWLETT, MC CONNELL & GOOGASIAN
Kenneth B. McConnell,
Of Counsel

Next Friend, VERDA BRADLEY; JEANNE GOINGS, by her Mother and Next Friend, BLANCH GOINGS; BEVERLY LOVE, JIMMY LOVE and DARRELL LOVE, by their Mother and Next Friend, CLARISSA LOVE; CAMILLE BURDEN, PIERRE BURDEN, AVA BURDEN, MYRA BURDEN, MARC BURDEN and STEVEN BURDEN, by their Father and Next Friend, MARCUS BURDEN; KAREN WILLIAMS and KRISTY WILLIAMS, by their Father and Next Friend, C. WILLIAMS; RAY LITT and MRS. WILBUR BLAKE, parents; all parents having children attending the public schools of the City of Detroit, Michigan, on their own behalf and on behalf of their minor children, all on behalf of any person similarly situated; and NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, DETROIT BRANCH; DETROIT FEDERATION OF TEACHERS, LOCAL 231, AMERICAN FEDERATION OF TEACHERS, AFL-CIO; BOARD OF EDUCATION OF THE CITY OF DETROIT, a school district of the first class; PATRICK McDONALD, JAMES HATHAWAY and CORNELIUS GOLIGHTLY, members of the Board of Education of the City of Detroit; and NORMAN DRACHLER, Superintendent of the Detroit Public Schools; ALLEN PARK PUBLIC SCHOOLS, SCHOOL DISTRICT OF THE CITY OF BERKLEY, BRANDON SCHOOLS, CENTERLINE PUBLIC SCHOOLS, CHERRY HILL SCHOOL DISTRICT, CHIPPEWA VALLEY PUBLIC SCHOOLS, SCHOOL DISTRICT OF THE CITY OF CLAWSON, CRESTWOOD SCHOOL DISTRICT, DEARBORN PUBLIC SCHOOLS, DEARBORN HEIGHTS SCHOOL DISTRICT NO. 7, EAST DETROIT PUBLIC SCHOOLS, SCHOOL DISTRICT OF THE CITY OF FERNDALE, FLAT ROCK COMMUNITY SCHOOLS, GARDEN CITY PUBLIC SCHOOLS, GIBRALTAR SCHOOL DISTRICT, SCHOOL DISTRICT OF THE CITY OF HARPER WOODS, SCHOOL DISTRICT OF THE CITY OF HAZEL PARK, INTERMEDIATE SCHOOL DISTRICT OF THE COUNTY OF MACOMB, LAKE SHORE PUBLIC SCHOOLS, LAKEVIEW PUBLIC SCHOOLS, THE LAMPHERE SCHOOLS, LINCOLN PARK PUBLIC SCHOOLS, MADISON DISTRICT PUBLIC SCHOOLS, MELVINDALE-NORTH ALLEN PARK SCHOOL DISTRICT, SCHOOL DISTRICT OF NORTH DEARBORN HEIGHTS, NOVI COMMUNITY SCHOOL DISTRICT, OAK PARK SCHOOL DISTRICT, OXFORD AREA COMMUNITY SCHOOLS, REDFORD UNION SCHOOL DISTRICT NO. 1, RICHMOND COMMUNITY SCHOOLS, SCHOOL DISTRICT OF THE CITY OF RIVER ROUGE, RIVERVIEW COMMUNITY SCHOOL DISTRICT, ROSEVILLE PUBLIC SCHOOLS, SOUTH LAKE SCHOOLS, TAYLOR SCHOOL DISTRICT, WARREN CONSOLIDATED SCHOOLS, WARREN WOODS PUBLIC SCHOOLS, WAYNE-WESTLAND COMMUNITY SCHOOLS, WOODHAVEN SCHOOL DISTRICT and WYANDOTTE PUBLIC SCHOOLS, KERRY and COLLEEN GREEN, by their Father and Next Friend, DONALD G. GREEN, JAMES, JACK and KATHLEEN ROSEMARY, by their Mother and Next Friend, EVELYN G. ROSEMARY, TERRI DORAN, by her Mother and Next Friend, BEVERLY DORAN, SHERRILL, KEITH, JEFFERY and GREGORY COULS, by their Mother and Next Friend, SHARON COULS, EDWARD and MICHAEL ROMESBURG, by their Father and Next Friend, EDWARD M. ROMESBURG, JR., TRACEY and GREGORY ARLEDGE, by their Mother and Next Friend, AILEEN ARLEDGE, SHERYL and RUSSELL PAUL, by their Mother and Next Friend, MARY LOU PAUL, TRACY QUIGLEY, by her Mother and Next Friend, JANICE QUIGLEY, IAN, STEPHANIE, KARL and JAAKO SUNI, by their Mother and Next Friend, SHIRLEY SUNI, and TRI-COUNTY CITIZENS FOR INTERVENTION IN FEDERAL SCHOOL ACTION NO. 35257; DENISE MAGDOWSKI and DAVID MAGDOWSKI, by their Mother and Next Friend, JOYCE MAGDOWSKI; DAVID VIETTI by his Mother and Next Friend, VIOLET VIETTI, and the CITIZENS COMMITTEE FOR BETTER EDUCATION OF THE DETROIT METROPOLITAN AREA, a Michigan non-Profit Corporation, SCHOOL DISTRICT OF THE CITY OF ROYAL OAK, SOUTHFIELD PUBLIC SCHOOLS, GROSSE POINTE PUBLIC SCHOOLS,

Respondents.

INDEX

Findings of Fact and Conclusions of Law in Support of Ruling on Desegregation Area and Development of Plan 1aa

Ruling on Desegregation Area and Code for Development of Plan of Desegregation 39aa

Exhibit P.M. 12 . . . . . 48aa

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RONALD BRADLEY, et al., Plaintiffs WILLIAM G. MILLIKEN, et al., Defendants and DETROIT FEDERATION OF TEACHERS, LOCAL 231, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, Defendant-Intervenor and DENISE MAGDOWSKI, et al., Defendants-Intervenor et al.	CIVIL ACTION 35257

FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF RULING ON DESEGREGATION AREA AND DEVELOPMENT OF PLAN

On the basis of the entire record in this action, including particularly the evidence heard by the court from March 28 through April 14, 1972, the court now makes the following Supplementary Findings of Fact and Conclusions of Law. It

should be noted that the court has taken no proofs with respect to the establishment of the boundaries of the 86 public school districts in the counties of Wayne, Oakland and Macomb, nor on the issue of whether, with the exclusion of the city of Detroit school district, such school districts have commited acts of de jure segregation.

INTRODUCTION

1. On September 27, 1971, this court issued its Ruling on Issue of Segregation. On October 4, 1971, this court issued from the bench guidelines to bind the parties in the submission of plans to remedy the constitutional violation found, *i.e.*, school segregation; and in particular this court noted that the primary objective before us was to deveop and implement a plan which attempts to "achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." The same day this court reiterated these requirements by orders "that the Detroit Board of Education submit a plan for the desegregation of its schools within 60 days" and "that the State defendants submit a metropolitan plan of desegregation within 120 days." In response to these orders hearings were held, and thereafter rulings issued, on Detroit-only plans (see Findings of Fact and Conclusions of Law on Detroit-Only Plans of Desegregation) and on the propriety of considering remedies which extend beyond the corporate geographic limits of the City of Detroit. (See Ruling on Propriety of Considering a Metropolitan Remedy to Accomplish Desegregation of the Public Schools of the City of Detroit.) Between March 28, 1972 and April 14, 1972, hearings were held on metropolitan proposals for desegregation of the Detroit public schools.

2. From the initial ruling on September 27, 1971, to this day, the basis of the proceedings has been and remains the violation: de jure school segregation. Since *Brown v. Board of Education* the Supreme Court has consistently held that the remedy for such illegal segregation is desegregation. The racial history of this country is writ large by constitutional adjudication from *Dred Scott v. Sanford* to *Plessy v. Ferguson* to

Brown. The message in *Brown* was simple: The Fourteenth Amendment was to be applied full force in public schooling. The Court held that "state-imposed" school segregation immeasurably taints the education received by all children in the public schools; perpetuates racial discrimination and a history of public action attaching a badge of inferiority to the black race in a public forum which importantly shapes the minds and hearts of succeeding generations of our young people; and amounts to an invidious racial classification. Since *Brown* the Supreme Court has consistently, and with increasing force, held that the remedy upon finding de jure segregation is prompt and maximum actual desegregation of the public schools by all reasonable, feasible, and practicable means available. This court finds that there is nothing in the law, wisdom, or facts, and the particular circumstances and arguments, presented in this case which suggest anything except the affirmance of these principles in both fact and law.

3. The task before this court, therefore, is now, and, since September 27, 1971, has always been, how to desegregate the Detroit public schools. The issue, despite efforts of the intervenors to suggest a new rationale for a return to the discredited "separate but equal" policy, [1] is not whether to desegregate. That question has been foreclosed by the prior and settled commands of the Supreme Court and the Sixth Circuit. Our duty now is to "grapple with the flinty, intractable realities" [2] of implementing the constitutional commands.

4. In the most recent set of hearings, several issues were addressed generally, including appropriate methods of pupils reassignment to desegregate schools; quality and capacity of school facilities; transportation needs incident to school desegregation; the effects of new school construction, and judicially established controls thereon, on any plan of desegregation; the reassignment of faculty and restructuring of facilities incident to pupil reassignment to accomplish school desegregation; appropriate and necessary interim and final administrative and financial arrangements; appropriate community, parental, staff, and pupil involvement in the desegregation process; and attention to individual, cultural, and

ethnic values, respect, dignity and identity. But the primary question addressed by these hearings, in the absence of submission of a complete desegregation plan by the state, remains the determination of the area necessary and practicable effectively to eliminate "root and branch" the effects of state-imposed and supported segregation and to desegregate the Detroit public schools.

SUPPLEMENTARY FINDINGS OF FACT

A. The Desegregation Area

5. The State Board of Education filed six (6) "plans" without recommendation or preference; intervening defendants Magdowski, et al., filed a proposal for metropolitan desegregation which included most of the tri-county area; the defendant Detroit Board of Education filed a proposal for metropolitan desegregation which included the entire tri-county area. [3] At the hearing plaintiffs presented a modification of the three proposals which actually described areas within which pupil desegregation was to be accomplished.

6. In the consideration of metropolitan plans of desegregation of the Detroit public schools, the State defendants stand as the primary defendants. They bear the initial burden of coming forward with a proposal that promises to work. In the context of this case, they represent the "school authorities" [4] to whom equity courts traditionally have shown deference in these matters. [5] Yet in its submission without recommendation of six (6) "plans" the State Board of Education has failed to meet, or even attempt to meet, that burden and none of the other State defendants has filled the void.

7. The State Board refused to make any recommendations to the court about the appropriate area for desegregation. In State Defendant Porter's words, the State Board "didn't make a decision, period." Defendants Milliken and Kelley merely filed objections to all six (6) plans.

8. Three of the State "plans" merely proposed concepts alternative to maximum actual desegregation. The Racial Proportion Plan described a statistical method of determining the

number of transfers involved in achieving a particular racial ratio in each school once an area of desegregation had been chosen. The Equal Educational Opportunity and Quality Integration Plan was admitted to be a non-plan and described criteria for education which, in whole or part, might, or might not, be applicable to any school system.

9. Only one State "plan," the Metropolitan District Reorganization Plan, attempted to describe an area within which desegregation should occur, called the "initial operating zone" (sometimes referred to hereafter as the "State Proposal"). That "plan," however, was primarily concerned with discussing a new governance structure for the desegregation area. Pupil reassignment was mentioned only in passing and no foundation was laid by State defendants for the particular area of desegregation described. Further, it suffered from the default of the State defendants by their stubborn insistence that under their self-serving, and therefore self-limiting, view of their powers they were free to ignore the clear order of this court and abdicate their responsibility vested in them by both the Michigan and Federal Constitution for supervision of public education and equal protection for all citizens.

10. From the very limited evidence in the record in support of the area in that state proposal, the primary foundation appears to be the particular racial ratio attained in that plan, approximately 65% black, 35% white, with the provision that the area could be expanded if "white flight" ensued. In the absence of any other persuasive foundation, such area is not based on any definable or legally sustainable criteria for either inclusion or exclusion of particular areas; and the concept of an "initial operating zone" raises serious practical questions, which should be avoided if a more permanent solution is now possible. In short, the area described by the "initial operating zone" does not appear to be based primarily on relevant factors, like eliminating racially identifiable schools; accomplishing maximum actual desegregation of the Detroit public schools; or avoiding, where possible, maintaining a pattern of schools substantially disproportionate to the relevant school community's racial composition by force of deliberate action by public authority. Nor,

on the evidence in this record, is the "initial operating zone" based on any practical limitation of reasonable times and distances for transportation of pupils. These factors seem to have played little part in the creation of the "initial operating zone" and are reflected less in its result.

11. At the hearings, moreover, the State defendants did not purport to present evidence in support, or even in opposition, to the State Proposal. The State, despite prodding by the court, presented only one witness, who merely explained what appeared on the face of the various State "Plans" submitted. The State's cross examination of witnesses was of no assistance to the court in ascertaining any preference, legal or educational. Put bluntly, State defendants in this hearing deliberately chose not to assist the court in choosing an appropriate area for effective desegregation of the Detroit public schools. Their resistance and abdication of responsibility throughout has been consistent with the other failures to meet their obligations noted in the court's earlier rulings. Indeed, some of the submissions spoke as clearly in opposition to desegregation as did the legislature in Sec. 12 of Act 48 ruled unconstitutional by the Sixth Circuit.

12. In such circumstances little weight or deference can be given to the unsupported submission of the State Board of Education. In light of the available alternatives and the facts produced at the hearing bearing on the issue, the court finds that State defendants offered no basis for ruling that the "initial operating zone" is the appropriate area within which to effectively desegregate the Detroit public schools.

13. Similarly, the newly intervening, defendant school districts did not attempt at the hearing to assist the court in determining which area was appropriate to accomplish effective desegregation. They were given the opportunity, by express written order and several admonitions during the course of the hearings, to assist the court in the task at hand but chose in their best judgment instead, in the main, to suggest their view that separate schools were preferable. The failure of the group of 40 districts to even comment that the court should exclude certain districts under any number of available rationales may in

part be explained by the awkward position chosen by them and their counsel of having single representation for districts on different sides of the various suggested perimeters.

14. The plans of intervening defendants Magdowski, et al., and the defendant Detroit Board of Education are similar. With slight variations they include the entire tri-county, metropolitan Detroit area, with that area divided into several regions or clusters to make the planning for accomplishing desegregation more manageable. Although both have as their main objective desegregation, their larger area arises primarily from a heavy emphasis on such factors as white flight and an appropriate socio-economic balance in each cluster and school. [6]

15. The authors of the Detroit Board and Magdowski plans readily admit that the regions or clusters for pupil reassignment which involve Mt. Clemens and Pontiac are not directly related to desegregation of the Detroit public schools and may be disregarded without any substantial adverse effect on accomplishing our objective. No other party has expressed any disagreement with that view. And the court finds that these two regions or clusters, for purposes of pupil reassignment, need not be included at this time in the desegregation area.

16. With the elimination of these two clusters there are, then, three basic proposals to be considered for the desegregation area: the State Proposal; the Detroit Board Proposal, and the proposal of defendant-intervenors Magdowski, et al. In addition, as noted, plaintiffs filed a modification of these three proposals.

17. Each of these proposals starts from the same two premises: (1) the tri-county area [7] constitutes the relevant school community which can serve as an initial benchmark in beginning the evaluation of how to effectively eliminate the racial segregation of Detroit schools; (2) but in some instances reasonable time and distance limitations for pupil transportation, and in other instances the actual area required to eliminate the pattern of racially identifable schools, limit the area within which pupil reassignment should occur. In terms of proof, putting aside arguments of impotence by the State defendants,

there was absolutely no contradictory evidence on these two criteria. The entire tri-county area includes areas, pupils, and schools in 86 school districts; it includes approximately one million students, of whom approximately 20% are black. Based on the evidence concerning school and non-school factors, [8] and reasonable time and distance limitations for pupil transportation, the court finds that both premises are accurate.[9]

18. The State Proposal includes the areas, pupils and school in 36 school districts, approximately 550,000 students are included of whom 36% are black. The Detroit Board Proposal (excluding clusters 8 and 12) includes the areas, pupils, and schools in 69 school districts; approximately 850,000 students are included, of whom 25% are minority. [10] The CCBE Proposal includes the areas, pupils, and schools in some 62 school districts; approximately 777,000 students are included of whom 197,000 (25.4%) are black. Plaintiffs' Proposal includes the areas, pupils, and schools in 54 school districts; approximately 780,000 students are included, of whom 197,000 (25.3%) are black.

19. The State Proposal approaches what may be considered a substantial disproportion in the context of this case. It is to be remembered that within any desegregation area, the racial composition of desegregated schools will vary from the area's racial mix. Given the variations in school plant, demographic and geographic factors, limiting the desegregation area to the State Proposal would result in some schools being substantially disproportionate in their racial composition to the tri-county area, and other schools racially identifable, all without any justification in law or fact. This finding is supported by the lack of any apparent justification for the desegregation area described by the State Proposal except a desire to achieve an arbitrary racial ratio.

20. Transportation of children by school bus is a common practice throughout the nation, in the state of Michigan, and in the tri-county area. Within appropriate time limits it is a considerably safer, more reliable, healthful and efficient means of getting children to school than either car pools or walking, and this is especially true for younger children.

21. In Michigan and the tri-county area, pupils often spend upwards of one hour, and up to one and one half hours, one-way on the bus ride to school each day. Consistent with its interest in the health, welfare and safety of children and in avoiding impingement on the educational process, state educational authorities routinely fund such transportation for school children. Such transportation of school children is a long-standing, sound practice in elementary and secondary education in this state and throughout the country. And the court finds such transportation times, used by the state and recommended here, are reasonable in the circumstances here presented and will not endanger the health or safety of the child nor impinge on the educational process. For school authorities or private citizens to now object to such transportation practices raises the inference not of hostility to pupil transportation but rather racially motivated hostility to the desegregated school at the end of the ride.

22. The Plaintiffs' Proposal made reference to P.M.8, based on the TALUS regional transportation and travel times study. Although there was dispute over the meaning of the study, such studies are deemed sufficiently reliable that major governmental agencies customarily rely on their projection for a variety of planning functions. When used by the plaintiffs, P.M. 8, in conjunction with the Detroit Board's survey of maximum school to school travel times, served as a rough guideline within which the plaintiffs' modification of other proposals attempted to stay in an effort to provide maximum desegregation without any more transportation time than is required to desegregate. This court finds that the utilization of these two factors, and the lower travel time estimates which should result, is a reasonable basis for the modification in the circumstances of this case. The court's duty and objective is not to maximize transportation but to maximize desegregation and within that standard it will always be reasonable to minimize transportation. To that end the court has accepted the more conservative perimeter for the desegregation area suggested as a modification by plaintiffs because it provides no less effective desegregation.

23. Based on these criteria, the State Proposal is too narrowly drawn.

24. Based on these criteria, parts of the Detroit Board Proposal are too sweeping.

25. Based on these criteria, the CCBE Proposal and the Plaintiffs' Proposal, roughly approximate the area so described [11].

26. There is general agreement among the parties, and the court so finds, that on the west the areas, schools, and pupils in the Huron, Van Buren, Northville, Plymouth and Novi districts [12] (1) are beyond the rough 40-minute travel time line; (2) are not necessary to effectively desegregate schools involved in the regions and clusters abutting those schools; and, (3) at this writing, are not otherwise necessary, insofar as pupil assignment is concerned, to provide an effective remedy now and hereafter. (See Findings 63-69 below.)

27. In the southwest the school districts of Woodhaven, Gibralter, Flat Rock, Grosse Ile and Trenton are within reasonable time and distance criteria set forth above. These virtually all-white districts are included in the Detroit Board Proposal but excluded from the plaintiffs' modification. The areas, schools and pupils in such school districts are similarly not necessary to effectively desegregate. (Clusters 13, 14, and 15 in Plaintiffs' Proposal are 20.5%, 24.4% and 22.7% black respectively.) There is nothing in the record which suggests that these districts need be included in the desegregation area in order to disestablish the racial identifiability of the Detroit public schools. From the evidence, the primary reason for the Detroit School Board's interest in the inclusion of these school districts is not racial desegregation but to increase the average socio-economic balance of all the schools in the abutting regions and clusters. In terms of what this court views as the primary obligation established by the Constitution – racial desegregation – the court deems the proper approach is to be more conservative: the court finds it appropriate to confine the desegregation area to its smallest effective limits. This court weighs more heavily the judicially recognized concern for limiting the time and distance of pupil transportation as much as possible, consistent with the constitutional requirement to eliminate racially identifiable schools, than a concern for expanding the desegregation area to

raise somewhat the average socio-economic balance of a relatively few clusters of schools. [13]

28. To the north and northeast, the only major disagreement among the Detroit Board Proposal and plaintiffs' modification relates to the areas, schools, and pupils in the Utica School District. This district is a virtually all-white, long, relatively narrow area extending several miles in a north-south direction away from the city of Detroit. Only the southern part of the district is within the rough, TALUS 40-minute travel time line.

29. The Detroit Board argues that Utica should be included in order to raise the average socio-economic balance of the abutting clusters and schools. In this instance, however, the overall racial composition of the cluster, 27.0% black, may tend toward disproportionate black relative to the tri-county starting point.

30. Mr. Henrickson, the planner for the Board, also suggested that Cluster 3 of Plaintiffs' Proposal, because of its omission of Utica, might present some problems, which he admitted could be solved, in designing a plan of pupil reassignment for the desegregation of schools. (See Findings 34-39 below.)

31. In light of these relevant, and competing, considerations the question presented by the Utica situation is close; however, at this writing, the court determines that the areas, schools, and pupils in the Utica School District need not be included, and therefore, should not be included in the desegregation area. [14]

32. The court finds that the appropriate desegregation area is described by plaintiffs' modification of the three primary proposals. Within that area the racial identifiability of schools may be disestablished by implementation of an appropriate pupil desegregation plan. The area as a whole is substantially proportionate to the tri-county starting point. Within the area it is practicable, feasible, and sound to effectively desegregate all schools without imposing any undue transportation burden on the children or on the state's system of public schooling. The

time or distance children need be transported to desegregate schools in the area will impose no risk to the children's health and will not significantly impinge on the educational process.

B. Clusters

33. The Detroit Board Proposal makes use of 16 regions or clusters. These clusters range from 36,000 to 105,000 pupils and from 17.5% to 29.7% "minority." The clusters are arranged along major surface arteries and utilize the "skip," or non-contiguous zoning, technique to minimize the time and distance any child need spend in transit. The use of these clusters basically subdivides the planning for pupil reassignment within the desegregation area into a series of smaller, manageable and basically independent plans. Thus, although as the new intervenors suggest devising a desegregation plan for a system with some 800,000 pupils has never been attempted, the practical and manageable reality is that desegregation plans for systems with from 36,000 to 100,000 pupils has been done and such plans have been implemented.

34. Plaintiffs' Proposal uses the same cluster technique and the same clusters, modified to fit the desegregation area. The 15 clusters range from 27,000 to 93,000 pupils and from 20.5% to 30.8% black. Only three relevant objections were raised by Mr. Henrickson, to the clusters as modified.

35. First, Cluster 4 was challenged as "concealing" a "problem," namely effective desegregation of other schools resulting from the omission of Utica from plaintiffs' modification. On cross-examination Mr. Henrickson admitted that the "problem" of actual pupil desegregation for these other schools could be "solved," that all schools within Cluster 4 could be affectively desegregated, and that Cluster 4 was smaller than the Detroit Board Cluster 6. The objection was thus narrowed to the possibility that a suburban high school constellation feeder pattern might have to be split between two Detroit high school constellation feeder patterns in order to desergregate. Several of the Detroit Board's clusters, however, also contain two Detroit high school feeder patterns.

36. This objection, splitting an existing feeder pattern, was raised directly in reference to Cluster 12. In neither instance, however, did Mr. Henrickson suggest that the time or distance of transportation involved was too long or that it would present administrative difficulty in devising a pupil assignment plan for either cluster. The objection relates solely to a matter of administrative convenience, namely the use of existing feeder patterns in preparing pupil assignments. For example, Mr. Henrickson previously admitted that in drawing a pupil assignment plan, an alternative to use of existing feeder patterns would be to "wipe the slate clean," and disregard existing feeder patterns. In fact one of the State plans suggested use of census tracts as an alternative. [15] On numerous occasions in the past Mr. Henrickson himself has reassigned parts of one feeder pattern to another school in order to relieve overcrowding and/or accomplish desegregation. The objection to such practice, therefore, is admittedly insubstantial.

37. The third objection relates to the exchange of Detroit Northern for Detroit Murray in Clusters 6 and 15 requiring that the students transported, if they proceed on their entire journey by way of the expressway, encounter an interchange which tends to be rather slow-moving. Such transportation time and distance, however, is well within the rough criteria for reasonableness and is shorter than or comparable to the maximum trips required in the Detroit Board's clusters. In other instances, Mr. Henrickson admitted that pupils in the Detroit proposal might also have to travel through similar interchanges. Moreover, the objection to this particular increase in travel time must be weighed against the apparent general decrease in time which would be required in plaintiffs' modified clusters as compared with the Detroit Board's clusters. In any event the desegregation panel, based on its investigation of all aspects of pupil assignment, remains free to suggest a modification of these clusters in order to reduce the time and number of children requiring transportation.

38. With that caveat, the court finds that plaintiffs' modification of the Detroit Board's clusters provides a workable, practicable, and sound framework for the design of a plan to desegregate the Detroit public schools.

C. Pupil Assignment and Transportation.

39. Example of various methods of pupil assignment to accomplish desegregation have been brought to the attention of the court by the parties: pairing, grouping, and clustering of schools; various strip, skip, island, and non-contiguous zoning; various lotteries based on combinations of present school assignment, geographic location, name, or birthday. Judicious use of these techniques – coupled with reasonable staggering of school hours and maximizing use of existing transportation facilities – can lead to maximum actual desegregation with a minimum of additional transportation.

40. Quite apart from desegregation, under any circumstances, transportation for secondary pupils living more than 1½ miles, and elementary pupils, living more than 1 mile from school, is often demanded by parents and should be provided. Moreoever, it is essential to the effectiveness of any desegregation plan that transportation be provided free to all students requiring it under that criteria. (Brewer v. Norfolk Board of Education, ____ F. 2d. ____ (April 1972) (4th Cir.)

41. In the recent past more than 300,000 pupils in the tri-county area regularly rode to school on some type of bus; this figure excludes the countless children who arrive at school in car pools, which are many, many times more dangerous than riding on the school bus.

42. Throughout the state approximately 35-40% of all students arrive at school on a bus. In school districts eligible for state reimbursement of transportation costs in the three affected counties, the percent of pupils transported in 1969-70 ranged from 42 to 52%.

43. In comparison approximately 40%, or 310,000, of the 780,000 children within the desegregation area will require transportation in order to accomplish maximum actual desegregation.

44. Hence, any increase in the numbers of pupils to be transported upon implementation of a complete desegregation plan over the number presently transported, relative to the state

and the tri-county area, should be minimal. Indeed, any increase may only reflect the greater numbers of pupils who would be transported in any event but for the state practice, which affected the segregation found in this case, and which denies state reimbursement to students and districts wholly within city limits regardless of the distance of the child from the school to which assigned. [16] (Ruling on Issue of Segregation at 14.) The greatest change is the direction of the buses.

45. There is uncontradicted evidence that the actual cost of transportation for a two-way plan of desegregation should be no greater than 50 to 60 dollars per pupil transported, [17] comparable to the present costs per pupil through the state. Increases in the total costs of pupil transportation in the desegregation area, therefore, will result primarily from providing all children requiring transportation a free ride instead of imposing the costs of transportation for many on the families in districts which are ineligible for state reimbursement and which fail to provide transportation.

46. By multiple use of buses, careful routing, and economies of scale resulting from a comprehensive system of pupil transportation, it may be possible to achieve savings in per pupil costs. For example in 1969-1970 many school districts in the tri-county area which used the same bus for even two loads per day lowered their per pupil costs to $40 or less. In a coordinated, urban pupil transportation system it may be possible to raise the bus use factor to three of more. (See "First Report" State Survey and Evaluation.)

47. In the tri-county area in the recent past there were approximely 1,800 buses (and another 100 smaller vans) used for the transportation of pupils. Assuming a rough average of 50 pupils per bus carrying three loads of students per day, this transportation fleet may prove sufficient to carry some 270,000 pupils.

48. Various public transit authorities now transport an additional 60,000 pupils on their regular public runs.

49. The degree to which these plausible bus-use factors

can be realized to their maximum, and whether these public transit facilities may be fully utilized in a plan of desegregation, must be answered upon careful investigation by a panel of experts.

50. There is no disagreement among the parties, and the court so finds, that additional transportation facilities, at least to the number of 350 buses, will have to be purchased to meet the increase in the number of students who should be provided transportation for either an interim or final plan of desegregation.

51. For all the reasons stated heretofore – including time, distance, and transportation factors – desegregation within the area described in physically easier and more practicable and feasible, than desegregation efforts limited to the corporate geographic limits of the city of Detroit.

52. The issue of transportation of kindergarten children, and their inclusion in part or in full in the desegregation plan, may require further study. There was general agreement among the experts who testified that kindergarten, but for "political" considerations, should be included, if practicable, in the desegregation plan. Kindergarten, however, is generally a half-day program. Transportation of kindergarten children for upwards of 45 minutes, one-way, does not appear unreasonable, harmful, or unsafe in any way. In the absence of some compelling justification, which does not yet appear, kindergarten children should be included in the final plan of desegregation.

53. Every effort should be made to insure that transportation and reassignment of students to accomplish desegregation is "two-way" and falls as fairly as possible on both races. Although the number of black and white children transported and reassigned at the outset will be roughly equal, it is inevitable that a larger proportion of black children will be transported for a greater proportion of their school years than white children, if transportation overall is to be minimized. To mitigate this disproportion, every effort should be made at the outset to randomize the location of particular grade centers. In the short term, full utilization of vastly under-capacity inner-

city schools may also help to mitigate the disproportion for some black children; and in the long term, new school capacity, consistent with other constitutional commands and the overall needs of the desegregation area and the surrounding area, should be added in Detroit, in relative proximity to concentrations of black student residence.

D. Restructuring of Facilities and Reassignment of Teachers

54. In the reassignment of pupils to accomplish desegregation the court finds that facilities must be substantially reallocated and faculty substantially reassigned by reason of the clustering, pairing and grouping of schools.

55. In order to make the pupil desegregation process fully effective the court finds that it is essential to integrate faculty and staff and to insure that black faculty and staff representation at every school is more than token. The court has previously found and reaffirms that "a quota or racial balance in each school which is equivalent to the system-wide ratio and without more" is educationally unsound, and that the desideratum is the balance of staff by qualifications for subject and grade level, and then by race, experience and sex. It is obvious, given the racial composition of the faculty and staff in the schools in the metropolitan plan area, and the adjusted racial composition of the students, that vacancies and increases and reductions in faculty and staff cannot effectively achieve the needed racial balance in this area of the school operation. Active steps must be taken to even out the distribution of black teachers and staff throughout the system.

56. In the desegration area approximately 16% of the faculty and 12% of the principals and assistant principals are black. In this context "token" means roughly less than 10% black. Moreover, where there is more than one building administrator in any school, a bi-racial administrative team is required wherever possible.

57. Every effort should be made to hire and promote, and to increase such on-going efforts as there may be to hire and

promote, additional black faculty and staff. Because of the systematic and substantial under-employment of black administrators and teachers in the tri-county area, an affirmative program for black employment should be developed and implemented.

58. The rated capacity of classrooms in the Detroit public schools is 32; in some of the suburban districts the average rated capacity is as low as 24 or 25. Utilization should be redetermined on a uniform basis.

59. In respect to faculty and staff, school facilities, and the utilization of existing school capacity, normal administrative practice in handling the substantial reallocation and reassignment incident to pupil desegregation should produce schools substantially alike.

60. In the circumstances of this case, the pairing, grouping and clustering of schools to accomplish desegregation with minimum transportation often requires use of grade arrangements such as K-4, K-5, or even K-6. In so planning pupil reassignments, it is sometimes necessary, and often administratively practicable, to include grades K-8 or even K-9 to achieve the maximum actual desegregation with the minimum transportation. Grade structures in most elementary schools in the desegregation area is a basic K-6; however, almost all other combinations are found. They differ within and among various districts.

61. In the reassignments of pupils and teachers and the reallocation of equipment and facilities required to accomplish desegregation, the elementary grades and schools present relatively few administrative difficulties, while the high school grades and facilities present the greater difficulties, particularly with respect to scheduling and curriculum.

62. For these reasons, if it develops that interim choices must be made because of the impossibility of immediate desegregation of all grades, schools, and clusters in the desegregation area, the weight of the evidence is, and the court so finds, that desegregation should begin first at the earliest grades for entire

elementary school groupings throughout as many clusters as possible.

E. School Construction

63. Relative to suburban districts the Detroit public schools, as a whole, are considerably over-capacity. (See also Finding 58, *supra.*) To alleviate this overcrowding equalize rated capacity and minimize and equalize transportation burdens borne by black pupils in the city, needed new school capacity, consistent with other requirements of a desegregation plan, should be added on a priority basis in the city of Detroit.

64. Relevant to the court's choice of a desegregation area more limited than the Detroit Board Proposal is the testimony, elecited on cross-examination from two of the primary authors of that proposal, related to the effects of controlling new school construction. The broader area in the Detroit proposal was chosen without any real consideration of the impact of controlling school construction in an area larger than the desegregation area. Upon reflection, both Dr. Flynn and Mr. Henrickson admitted that closely scrutinizing and limiting the addition of capacity to areas outside the desegregation area might lead them to re-evaluate the need, in the context of maintaining now and hereafter a unitary system, to include an area as sweeping as recommended by the Detroit Board Proposal.

65. In our Ruling on Issue of Segregation, pp. 8-10, this court found that the "residential segregation throughout the larger metropolitan area is substantial, pervasive and of long standing" and that "governmental actions and inaction at all levels, Federal, State and local, have combined with those of private organizations, such as loaning institutions and real estate associations and brokerage firms, to establish and to maintain the pattern of associations and brokerage firms, to establish and to maintain the pattern of residential segregation through the Detroit metropolitan area." We also noted that this deliberate setting of residential patterns had an important effect not only on the racial composition of inner-city schools but the entire School District of the City of Detroit. (Ruling on Issue of Segregation at 3-10.) Just as evident is the fact that suburban

school districts in the main contain virtually all-white schools. The white population of the city declined and in the suburbs grew; the black population in the city grew, and largely was contained therein by force of public and private racial discrimination at all levels.

66. We also noted the important interaction of school and residential segregation: "Just as there is an interaction between residential patterns and the racial composition of the schools, so there is a corresponding effect on the residential pattern by the racial composition of schools." Ruling on Issue of Segregation at 10. *Cf. Swann v. Charlotte-Mecklenberg*, 402 U.S. 1, 20-21 (1971); "People gravitate toward school facilities, just as schools as located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner city neighborhoods."

67. Within the context of the segregatory housing market, it is obvious that the white families who left the city schools would not be as likely to leave in the absence of schools, not to mention white schools, to attract, or at least serve, their children. [18] Immigrating families were affected in their school and housing choices in a similar manner. Between 1950 and 1969 in the tri-county area, approximately 13,900 "regular classrooms," capable of serving and attracting over 400,000 pupils, [19] were added in school districts which were less than 2% black in their pupil racial composition in the 1970-71 school year. (P.M. 14; P.M. 15).

68. The precise effect of this massive school construction on the racial composition of Detroit area public schools cannot be measured. It is clear, however, that the effect has been substantial. [20] Unfortunately, the State, despite its awareness of the important impact of school construction and announced policy to control it, acted "in keeping generally, with the discriminatory practices which advanced or perpetuated racial segregation in these schools." Ruling on Issue of Segregation at 15; see also *id.*, at 13.

69. In addition to the interim re-evaluation of new school

construction required in the order, pursuant to the State Board's own requirements, the final plan will consider other appropriate provisions for future construction throughout the metropolitan area.

F. Governance, Finance and Administrative Arrangements

70. The plans submitted by the State Board, the Detroit Board, and the intervening defendants Magdowski, et al., discuss generally possible governance, finance and administrative arrangements [21] which may be appropriate for operation of an interim or final plan of desegregation. Without parsing in detail the interesting, and sometimes sensible, concepts introduced by each plan, it is sufficient to note that each contemplates overlaying some broad educational authority over the area, creating or using some regional arrangement (with continued use or eventual redrawing of existing districts), and considerable input at the individual school level. The court has made no decision in this regard and will consider the matter at a subsequent hearing.

71. Each concept needs to be "fleshed-out" in the hard prospect of implementation of a final plan of desegregation and what is necessary and essential, and only that, for the successful operation of that plan of school desegregation now on an interim basis and hereafter on a permanent footing.

72. There are now some 86 school districts in the tri-county area of varying size, numbers of pupils, shapes, and wealth.

73. In another context, the State Board of Education found each related to a "metropolitan core city" (Detroit) as "city," "town," or "urban fringe" districts.

74. The boundaries of these school districts in general bear no relationship to other municipal, county, or special district governments, needs or services.[22]

75. Some educational services are already provided to students on an interdistrict, county, intercounty, or metropolitan basis: and many support services are provided by the intermediate school districts and the State Department of

Education. For various reasons many pupils already cross school district lines to attend school or receive educational services. [23]

76. In many respects – patterns of economic life, work, play, population, planning, transportation, health services – the tri-county area constitutes a rough series of interrelated communities constituting, in the view of the United States Census Bureau, a single standard metropolitan statistical area.

77. Local units of government in the metropolitan area have in many instances joined together for the purpose of providing better solutions to problems confronting them. In such instances various units of government have either disregarded local boundaries or have concluded that the problems were such as to call for a metropolitan solution. In some cases they have created overlay organizations. SEMCOG, recreational authorities, a metropolitan sewage system, SEMTA, and the Detroit Water System are examples of these metropolitan approaches.

78. Indeed, the State defendants at this very moment are attempting in state court to strike down one irrationality, and the discriminatory effect, of the existing school district arrangement, *i.e.*, finance, apparently in the hope of moving to a virtual state-wide assumption of costs.

79. In such circumstances there has been no showing that the existing school district boundaries are rationally related to any legitimate purpose; and the court finds that the particular welter of existing boundaries for 86 school districts is not necessary to the promotion of any compelling state interest.

80. On the basis of the present record, the court is of the view that the shifts in faculty, staff, resources and equipment and the exchanges of pupils necessary to accomplish maximum actual desegregation may be made, at least on an interim basis, by contractual agreements or otherwise among and between the existing school districts. The court has serious reservations, however, whether such procedures will inevitably threaten the continuing effectiveness of a plan of desegregation over the long-term. On these issues more evidence and further hearings will be necessary before reaching a final decision.

81. The State defendants, and in particular the State Board of Education which is charged with the primary responsibility for public education in Michigan, are the primary parties to be charged with responsibility to undertake that vital inquiry and return with recommendations about those governance, financial, and administrative arrangements which are necessary and essential to the successful implementation of a plan of desegregation on an interim and continuing basis.

G. Involvement of Affected Persons and Communities and Protection Against Racial Discrimination in the Desegregation Process

82. The court has received uncontroverted evidence in the plans filed by every party and in testimony, and advice in several briefs amicus curiae, and the court finds, that the following additional factors are essential to implementation and operation of an effective plan of desegregation in the circumstances of this case:

(a) Bi-racial councils made up of the parents and staff, and, where appropriate, pupils, should be set up at each school; the persons most affected must be encouraged and given every opportunity to participate in the implementation of desegregation.

(b) Curriculum content, and all curriculum materials and student codes, must be re-evaluated and reflect the diversity of ethnic and cultural backgrounds of the children now in the schools. As far as possible, those immediately affected by these decisions at the individual school level should participate in that process.

(c) In-service training for faculty and staff for multi-ethnic studies and human relations should be required; we must, after all, rely primarily on our teachers and children to respect, nurture, and deal with the diversity of students present in the desegregated school.

(d) The entire grading, reporting, counselling, and testing program should be reviewed in light of desegregated

schools compared to traditional schools and to avoid imposing the effects of past discrimination on the children. Tracking, whether so labeled or by any test, which has racial effects should not be utilized; within schools a pattern of classes which are substantially disproportionate in their racial composition from the relevant school or grade mix should be closely scrutinized and maintained only if necessary to promote a compelling educational objective.

83. In making the finding above, we remind the parties that this court's task is to enforce constitutional rights not to act as a schoolmaster; the court's task is to protect the constitutional rights here found violated with as little intrusion into the education process as possible. The court's objective is to establish the minimum constitutional framework within which the system of public schools may operate now and hereafter in a racially unified, non-discriminatory fashion. Within that framework the body politic, educators, parents, and most particularly the children must be given the maximum opportunity to experiment and secure a high quality, and equal, educational opportunity. However, experience has proven that specific goals, deadlines and methods of reporting and review must be required in all desegregation cases to insure compliance.

H. Timing

84. The burden remains with State defendants to show why desegregation for all schools, grades, classrooms, and pupils in the desegregation area should not proceed now, *i.e.*, in the context of this litigation, for the 1972 fall term. The design and implementation of desegregation plans for all grades in 15 clusters – including pupil assignments, necessary reassignment of faculty and restructuring of facilities, planning and acquiring the needed transportation facilities – is conceded by all parties to be a major undertaking. Yet next fall will already be a full year, not just four or six or even eight weeks, *Cf. Carter v. West Feliciano Parish School Bd.*, 396 U.S. 290 (1970), after the initial ruling by this court of the need for maximum feasible desegregation "now." In such circumstances the burden to prove the infeasibility of implementation of complete relief is high.

85. The desegregation panel, therefore, must make every effort to plan to implement as much actual desegregation, for as many clusters, schools, grades, classrooms, and students as possible.

86. At a minimum, there is agreement among, and evidence from, the experts that desegregating several grades, and more particularly entire elementary schools, within many, if not all, clusters may be accomplished in the fall.

87. In view of Findings 60 to 62, *supra*, if hard choices must be made for the fall, any interim plan should attempt to desegregate grades K-6, K-8, or K-9 in as many entire clusters as possible; and, in the absence of some other showing, there appears no reason why a complete plan may not be implemented by fall 1973. [24]

88. A heavy burden rests with those who seek delay in any way, shape, kind, degree or extent to convince the court that maximum actual desegregation cannot proceed effectively forthwith.

89. In view of the time constraints, the need to discharge this burden forthwith, the State defendants' default in assisting this court to determine the appropriate desegregation area, and the State defendants' asserted and evident lack of available planning capacity suited to the task, the court finds that some additional entity must be charged with the task of preparing a pupil assignment plan to accomplish maximum actual desegregation and a transportation plan within the framework this day established. To that end a panel of skilled experts, broadly representative of the parties and their interests, appointed by the court and assigned that task, is required to discharge effectively and promptly these two tasks.

90. State defendants remain charged with the duty, however, of coming forward with other necessary reports and plans concerning those governance, administrative, and financial arrangements necessary and essential to the implementation of an effective plan of desegregation on an interim and on-going basis.

I. The Plan

91. Based on the entire evidence amassed in this case, the court finds that an educationally sound, administratively feasible, constitutionally adequate, practicable and effective plan of desegregation may be developed, implemented, and operated hereafter for the desegregation area as set forth in findings 1-90 above.

CONCLUSIONS OF LAW

1. The court has continuing jurisdiction of this action for all purposes, including the granting of effective relief. Bradley v. Milliken, Ruling on Issue of Segregation, September 27, 1971; Findings of Fact and Conclusions of Law on Detroit-Only Plans of Desegregation, March 28, 1972.

2. A de jure segregation violation having been found, the minimum remedy is maximum actual desegregation, taking into account the practicalities of the situation. [25] *Bradley v. Milliken*, Oral Order, October 4, 1971; Findings of Fact and Conclusions of Law on Detroit-Only Plans of Desegregation, March 28, 1972; *Brown v. Board of Education*, 347 U.S. 383 (1954), 349 U.S. 294 (1954); *Green v. County School Bd.*, 391 U.S. 430 (1968); *Alexander v. Holmes County Bd. of Ed.*, 396 U.S. 19 (1969); *Carter v. West Feliciano School Bd.*, 396 U.S. 290 (1970); *Swann v. Charlotte Mecklenberg Bd. of Ed.*, 402 U.S. 1 (1971); *Davis v. Board of School Commissioners of Mobile*, 402 U.S. 33 (1971); *Davis v. School District of City of Pontiac*, 443 F. 2d 573, *cert. denied*, 925 U.S. 233 (1971).

3. The remedial obligation rests with school authorities, but where in any way they fail, or are unable because of the circumstances of the case, to fulfill any part of the obligation promptly and fully, the court has broad equity power, and the duty, to insure that demonstrable progress be made now; that a schedule for planning be adopted forthwith; and that necessary planning be specifically ordered and immediately undertaken in order that a constitutionally adequate plan may be fashioned and finally ordered implemented as soon as possible. *Swann v. Charlotte-Mecklenberg Board of Education*, 311 F. Supp. 265 (W.D.N.C. 1970), *aff'd*, 402 U.S. 1 (1971); *Carter v. West*

Feliciano School Bd., 396 U.S. 226, 227-228 (1969), 396 U.S. 290 (1970); *Acree v. County Board of Education*, No. 72-1211 (5th Cir. March 31, 1972); Rule 53, Fed. R. Civ. P., *P.A.R.C. v. Pennsylvania*, 334 F. Supp. 1247, 1266-7 (E.D. Pa. 1971). Only then will the court in this case be apprised fully of the practicalities of the situation, and what is reasonable and feasible, in order that a final order may issue. School authorities, of course, will be given an opportunity to (1) raise relevant objections, (2) make suggestions for modifications, (3) or present an alternative plan of desegregation; and their judgment and expertise will be considered and given appropriate weight by the court.

4. Funds must either be raised or reallocated, where necessary, to remedy the deprivation of plaintiffs' constitutional rights and to insure that no such unconstitutional neglect recurs again. *Shapiro v. Thompson*, 397 U.S. 254, 265-266 (1970); *Boddie v. Connecticut*, 91 S. Ct. 780, 788 (1971); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Graham v. Richardson*, 403 U.S. 365, 374-375 (1971); *Mayer v. Chicago*, 404 U.S. 189, 197 (1971); *Griffin v. Prince Edward County*, 377 U.S. 218 (1964); *Hoosier v. Evans*, 314 F. Supp. 316, 320-321 (D. St. Croix, 1970); *United States v. School District 151*, 301 F. Supp. 201, 232 (N.D. Ill. 1969), *aff'd as modified*, 432 F. 2d 1147 (7th Cir. 1970), *cert. denied*, 402 U.S. 943 (1971); *Plaquemines Parish School Board v. U.S.*, 415 F. 2d 319 (5th Cir. 1970); *Bradley v. Richmond*, _____ F. Supp. ____, (April 1971); *Brewer v. Norfolk*, No. 71-1900 (4th Cir., March 7, 1972) (Slip op. at pp. 7-8). It would be a cruel mockery of constitutional law if a different rule were to be applied to school desegregation cases. After all schooling is this nation's biggest industry and the most important tast of government left to the states by the Constitution. In this case, were a different rule to be applied, it would constitute a gigantic hypocrisy: After all the money which has been spent over the years creating and maintaining the segregated condition, the relatively small amounts of money required to undo that segregation can be found. The law, surely, requires at least that. And the application of the commands of *Swann* does require that in almost every school desegregation case which has been brought to this court's attention.

5. In the substantial reassignment of faculty and restructuring of facilities required by the clustering, pairing, and grouping of schools to accomplish pupil desegregation, normal administrative practice should lead to schools with substantially like facilities, faculty and staff, and equipment. *Swann, supra,* 402 U.S. at 18-20. Moreover, special care should be taken in the necessary reassignment of faculty to avoid creating or maintaining the racial identification of schools "simply by reference to the racial composition of teachers and staff." *Swann, supra,* 402 U.S. at 18. In any event, the equitable discretion of the court is broad enough to insure that those aspects of faculty desegregation and equalization of facilities which are essential to the effective operation of a desegregation plan are included in the planning and final order, *Swann, supra,* 402 U.S. at 15; *U.S. v. Montgomery County Board of Ed.,* 395 U.S. 225 (1969); *Hecht v. Bowles,* 321 U.S. 329-330 (1944); and no contract, union agreement or otherwise, or Board policy or practice may impede these Fourteenth Amendment obligations. *U.S. v. Greenwood Municipal Separate School District,* 406 F. 2d 1086, 1094 (5th Cir.), *cert. denied,* 395 U.S. 907 (1969); *Berry v. Benton Harbor,*_____F. Supp.____ (W.D. Mich. 1971).

6. The Federal courts have repeatedly rejected plans exempting the lower grades from integration, relying less on educational data than upon the hard legal fact that segregation at any age is a denial of the equal protection of the law. See, *e.g., United States v. Jefferson County Bd. of Educ.,* 372 F.2d 836 (9th Cir. 1966), *aff'd on rehearing en banc,* 380 F.2d 385 (5th Cir. 1967). To leave grades K through 3 exempt from a desegregation plan is not to eliminate segregation "root and branch." *Green v. County School Board of New Kent County,* 391 U.S. 430 (1968).

7. The consistent application of settled constitutional law invests this court with the equitable power, and the duty, to order preparation, and thereafter implementation, of a practicable and sound plan which embodies the principles set forth in these findings and conclusions and the attached memorandum and order. See, generally, Ruling on Propriety of Considering a Metropolitan Remedy to Accomplish Desegregation of the

Public Schools of the City of Detroit, March 24, 1972; Findings of Fact and Conclusions of Law on Detroit-Only Plans, March 24, 1972; oral ruling on offers of proof, April 13, 1972; and the cases cited therein.

8. School construction practices throughout the metropolitan area have added to and reinforced the pattern of segregation referred to. Although there were vacant seats throughout the city to which students could have been assigned at lesser cost and with the achievement of integration, continued sums were expended for construction of new schools designed to service particular areas of racial concentration, and such schools opened as and have continued to be racially identifiable in violation of the Fourteenth Amendment. *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1, 18-20 (1971); *United States V. School Dist. 151*, 404 F.2d 1125, 1132-33 (7th Cir. 1968); *Davis v. School Dist. of Pontiac*, 309 F. Supp. 734, 741-42 (E.D. Mich. 1970), *aff'd*, 443 F.2d 573 (6th Cir. 1971); *Spangler v. Pasadena City Bd. of Educ.*, 311 F. Supp. 501, 517-18 (C.D. Calif. 1970); *Johnson v. San Francisco Unified School Dist.*, Civ. No. C-70-1331 (N.D. Calif. April 28, 1971); *Brewer v. School Board of the City of Norfolk*, 397 F.2d 37, 42 (4th Cir. 1968); *Cf. Sloan v. Tenth School Dist. of Wilson County*, _____ F.2d _____ (6th Cir. 1970); *United States v. Board of Educ. of Polk County*, _____ F. 2d _____ 4th Cir. 1968); *Kelley v. Altheimer*, _____ F.2d _____ (8th Cir. 1967); *Bradley v. School Bd.*, _____ F. Supp. _____ (E.D. Va. 1971); *Clark v. Board of Educ. of Little Rock*, 401 U.S. 971 (1971).

9. The legal effects of racially discriminatory confinement to a school district are not different from the effects of such containment within a district. *E.g., Lee v. Macon County Board of Education*, 558 F.2d 746 (5th Cir. 1971); *Haney v. County Board Sevier*, 410 F.2d 920 (8th Cir. 1969), 429 F.2d 364 (8th Cir. 1970).

10. Where the actions of state defendants and local school authorities throughout the metropolitan area have had the natural, foreseeable, and actual effect of building upon, taking advantage of, and encouraging racially segregated demographic patterns deliberately fixed by governmental action at all levels

with the effect of creating and maintaining racial segregation in the public schools, there is a present obligation to eliminate the continuing effects of such violation; and the District Court has the duty, upon default by school authorities, to intervene to secure compliance with the Constitution pursuant to the sound exercise of traditional equity powers consistent with the practicalities of the local situation. *Swann v. Charlotte-Mecklenberg*, 402 U.S. 1, 15-16, 20-21, 31-32 (1971). *Cf.* Findings of Fact and Conclusions of Law on Detroit-Only Plans of Desegregation, p.5, Conclusion 4. In devising remedies where state-imposed segregation has been established, it is the responsibility of school authorities and district courts to see to it that future school construction and abandonment is not used and does not serve to perpetuate or re-establish the violation. *Swann, supra*, 402 U.S. at 21.

11. Moreoever, where the State, and named defendants, are substantially implicated in the segregation violation found and are ultimately responsible for public schooling throughout the state, the consistent application of constitutional principles requires that this court take all steps necessary and essential to require them to desegregate the Detroit public schools effectively and maintain, now and hereafter, a racially unified, non-discriminatory system in the absence of a showing that the judicial intervention here contemplated will frustrate the promotion of a legitimate and compelling state policy or interest. *Reynolds v. Sims*, 377 U.S. 533, 575 (1964); *Hunter v. City of Pittsburg*, 207 U.S. 161, 178-179 (1907); *Phoenix v. Kolodziejski*, 399 U.S. 204, 212-213 (1970); *Kramer v. Union Free School District*, 395 U.S. 621, 633 (1969); *Williams v. Illinois*, 399 U.S. 235, 244-45 (1970); *Shelton v. Tucker*, 364 U.S. 479, 488 (1966); *Green v. County School Bd.*, 391 U.S. 430, 439, 442; *Swann v. Charlotte-Mecklenberg*, 402 U.S. 1 (1971); *Davis v. Bd. of School Commissioners*, 402 U.S. 33 (1971); *Brown v. Board of Education*, 347 U.S. 483 (1954); *Brown v. Board of Education*, 349 U.S. 292, 300 (1955); *Monroe v. Board of Commissioners*, 391 U.S. 450, 459 (1968).

FOOTNOTES

1. In the main such proof entirely misses the point: the violation here found has to do with school segregation caused in substantial part by force of public authority and action; yet the intervening defendants' questions and offer of proof speak mainly to educational theory and recent and sometimes contradictory research about narrowly measured educational effects, mostly on achievement test scores, of quite limited beginnings of racial, or socio-economic integration of various types and as compared with the effects of dollar or other resource inputs and continued segregation. This court does not understand, however, that such research, from the Coleman report to its many reanalyses, formed the primary bases for the Brown decision or any of its progeny. See, e.g., Brunson v. Bd. of Trustees, 429 F.2d 820, 826 (4th Cir. 1970) (J. Sobeloff, concurring). In the context similar to newly intervening defendants' objections to desegregation, the Supreme Court in Swann specifically held that such factors constitute an impermissible limit upon the duty to desegregate. 402 U.S. at 24, Fn. 8. Citation to such research, either in support or rejection of school desegregation, misses the primary point: insofar as pupil assignments are concerned, the system of public schooling in every state must be operated in a racially non-discriminatory, unified fashion; until that objective is met, the very system of public schooling constitutes an invidious racial classification. The adoption of an education theory having the effect of maintaining a pattern of de jure segregation is therefore clearly impermissible. (Whether such theories, research, or evidence on educational quality or inequality form the basis for requiring judicial intervention and relief in the absence of a finding of de jure segregation is a question this court need not face.)

In any event, the Court of Appeals for the Sixth Circuit held, on June 19, 1970, that greater, not less, desegregation is the proper manner to alleviate the problem of disparity in achievement. Monroe v. Board of Commissioners, Jackson, Tenn., 427 F.2d 1005, 1008 (C.A. 6, 1970).

2. Chief Justice Burger in Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1, 6.

3. Defendants Magdowski, et al., originally opposed to desegregation, during the course of the taking of proofs on the issue of segregation, conceded that the public schools of the city of Detroit were in fact segregated, and took the early lead in suggesting that the only effective avenue for desegregation was a metropolitan plan. The Detroit Board of Education, while continuing to deny that it has been guilty of any act of segregation, took the position that if desegregation were to be undertaken it could be done only on a metropolitan basis. So that now the white parents of the city of Detroit and its Board of Education – the parties most directly involved with the lot of the students in the Detroit school system – see no alternative to, and, for all practical purposes seek a metropolitan solution to the basic Detroit school problem.

4. In the context of this hearing, the defendant Detroit Board of Education is not in a position to act as the usual "school authority" primarily responsible for suggesting an appropriate desegregation area simply because its authority does not extend beyond the geographic limits of the city of Detroit. The competence, knowledge of local conditions, and expertise of those schoolmen who helped prepare the Detroit Board's proposal, however, may be utilized and given appropriate weight.

5. In Oliver v. Kalamazoo Board of Education, #K88-71, Judge Fox pointed out the primary responsibility of the state: "The State of Michigan is represented by two entities, but the entity is an agent of the State . . . [T]he Constitution says something about your [the State's] responsibility." The court went on to order the State to take an active role. Pre-trial order and transcript, May 1, 1972.

6. The Detroit Board plan places heavier reliance on white flight and socio-economic factors, while the Magdowski proposal in addition places an emphasis on maintaining a minimum percentage black in each school. These considerations in no way determine the court's choice of a desegregation area necessary to meet constitutional requirements. In fairness, however, it also should be noted that the desegregation area, which the court deems to best meet constitutional requirements, also happens in the main, to meet the other concerns expressed in

these two proposals. That the Board's interest in socio-economic integration is largely met by racial desegregation is not surprising. There is uncontroverted evidence in the record, and the court so finds, that there is a high correlation between blacks and persons of a low socio-economic status, the result, in the main, of the cumulative effects of past and present racial discrimination including discrimination in education. At some point hereafter, of course, school authorities with responsibility for implementation and operation of the racially-unified non-discriminatory school system contemplated, or parts thereof, may and should include in its plan other educational goals and needs whether or not they are required by the law or any court. Swann v. Charlotte-Mecklenberg, 402 U.S. at 16.

7. If a state is constitutionally forbidden to institute a system of racial segregation by the use of artificial boundary lines, it is likewise forbidden to perpetuate a system whose effect is to maintain segregation. "There is no legally protected vested interest in segregation. If there were, then Brown v Board of Education and the numerous decisions based on that case would be pointless. Courts will not say in one breath that public school systems may not practice segregation, and in the next that they may do nothing to eliminate it." Wanner v School Bd. of Arlington County, 357 F.2d 452, (Soboloff, Cir. J.), pp. 454 and 455. The historic fact is that existing conditions are based on a design to segregate the races. To hold that segregation, once accomplished, is sacrosanct and beyond constitutional reach, is to say that the United States Constitution and its Amendments, and their provisions for equality, are mere rhetoric.

8. See Findings 70-78, infra.

9. The interplay of these two factors summarizes two other guideposts or starting points: maximum feasible desegregation and eliminating racially identifiable schools. Factors such as time and distance limitations, together with the rough definitions of substantial disproportion with the relevant school community's pupil racial composition, in turn largely determine the meaning of "eliminating racially identifiable schools" and what constitutes "maximum feasible desegregation," in the

particular circumstances here present and in the context of a prior finding of segregation.

10. The Detroit Board Proposal contemplates desegregation on a "minority"-white basis. The proof in this cause, however, has been aimed at the segregation of black children and white children; similarly the remedy has been so defined, argued, and in the main presented by parties. The court finds, therefore, that the area, and further planning, should, in the main, be confined to a black-white breakdown.

11. To the Southwest, Plaintiffs' Proposal falls on the side of less time in transit than the 40-minute guideline because inclusion of more area is not required to desegregate. (see Finding 27, infra.)

12. Moreover, in the main, the areas, schools, and pupils in these districts are not as fully members of the greater Detroit school community: many are less urban; they are the furthest in terms of time, distance, and contact from the Detroit area's economic and social acitivities [SIC]; and many are more oriented, if anything, to urban areas other than Detroit, for example, the Ann Arbor - Ypsilanti area.

13. The court notes, however, that the range of average socio-economic status for the various regions or clusters in Plaintiffs' Proposal is similar to that in the Detroit Board Proposal: based on the Michigan Assessment the range in Plaintiffs' Proposal happens to be 44.7 to 53.7, while in the Detroit Board Proposal the range is 46.3 to 53; and only three of the 15 clusters of schools in Plaintiffs' Proposal fall below 46.3.

14. Because of the closeness of the question, particularly as it relates to any problems which may arise hereafter in establishing a pupil desegregation plan, the court feels that some opportunity should be given to the expert panel to suggest a modification of this tentative resolution. See also Findings 34-38 below.

15. A common practice in other cases is the use of "pupil locator" maps. See Northcross v. School Board of City of Memphis,_____F. 2d_____(6th Cir. 1971).

16. For years these city-contained school districts, which include some suburban districts in the desegregation area, as well as the Detroit Public Schools, have demanded without success that this inequitable state practice be changed so that all districts could be reimbursed on the same basis for pupil transportation.

17. The figure almost twice that which appears in several of the State "plans" was based on the assumption that busing would be "one-way" with black children being assigned to suburban schools. Mr. Wagner, the state official in charge of pupil transportation, provided the information on which that estimate was based and also informed his superiors that a two-way plan of desegregation and transportation would cost much less per pupil. The state defendants did not bring this important fact to the court's attention in any of their submissions; it was uncovered and fully explored in the disposition of Mr. Wagner taken by plaintiffs.

18. This phenomenon was noted in Swann, 402 U.S. 1, 20-21. The principle was long known, and actively, supported by the F.H.A. For example, consider that public agency's early understanding in its 1936 manual that white subdivision developments require white schools: "if the children of people living in such area are compelled to attend school where the majority or a good number of the pupils represent a far lower level of society or an incompatible racial element, the neighborhood under consideration will prove far less stable and desirable than if the condition did not exist."

19. This figure assumes 30 children/regular classroom. Although rated capacities may be lower, the figure for regular classrooms does not include several types of instructional, recreational, laboratory, and other rooms which add overall pupil capacity to schools.

20. The resulting pattern is unmistakable: "Residential segregation within the city and throughout the larger metropolitan area is substantial, pervasive and of long standing. Black citizens are located in separate and distinct areas within the city and are not generally found in the suburbs. While the racially

unrestricted choice of black persons and economic factors may have played some part in the development of this pattern of residential segregation, it is, in the main, the result of past and present practices and customs or racial discrimination, both public and private, which have and do restrict the housing opportunities of black people. Perhaps the most that can be said is that all of them [various governmental units], including school quthorities, are, in part, responsible for the segregated condition which exists." Ruling on Issue of Segregation, 8 and 10. Moreover, an examination of PX 181, 192 and 185 shows that black children often remain isolated in predominately black schools in the few suburban school districts with any numbers of black pupils. In the last several weeks the local press has reported that the United States Office of Education cut off funds for one such district.

21. Included in this set of arrangements are contract relationships of various types concerning personnel, property and debts.

22. The defendant, William G. Milliken, Governor of the State of Michigan, in his amicus brief filed in the Supreme Court of the United States, No. 71-1332, San Antonio Independent School District v. Demetrio P. Rodriquez, says, page II:

> "1. Amici, whose individual and particular interests are set forth in more detail below, are the Governors of the above-listed States. As Governors and Chief executive officers of their respective States, Amici are responsible for upholding and carrying out the commands of the Constitutions and laws of their various States, including the provisions thereof requiring the establishment of public schools and school districts and commanding the children of their States to attend school. Amici are responsible for financial decisions affecting all State operations, including those pertaining to support and financing of the public schools.
>
> "Amici are deeply concerned about the ongoing and continuing crisis in public education and the difficulties

facing public educational systems in their States and around the nation. Amici recognize that grave inequities exist because of variation in local property tax bases upon which local school districts must rely in order to support their school systems. Amici believe that these inequalities in educational resources violate the requirements of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and that these inequalities must be eliminated* * * *"

The Governors' amicus brief, speaking of the State of Texas, could as well be said of the State of Michigan, when it used these words:

"It is also undisputed that the local school districts and their boundaries, and hence the aggregate value of the property they contain, are entirely the creation of and their maintenance is the responsibility of the State of Texas. Furthermore, the detailed regulation of public education financing in Texas * * * is a state not a local responsibility. Indeed, the school districts have the power to raise funds for education only as a result of delegation by the State of its own power to tax for the general welfare." (Page 8 of brief.)

"Since the State could not discriminate directly against students residing in poorer localities, it should not be permitted to accomplish the same result by dividing its responsibility for equal education with local school districts and failing to supplement the funds raised by the school districts sufficiently to eliminate discrimination." *(Page 11 of brief.)

*Compare Griffin v. County School Board, 377 U.S. 218 (1964). While a State may delegate certain of its functions to smaller subdivisions such as cities or counties, it cannot escape accountability for their actions. Such subdivisions are "created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them * * * * The number, nature, and duration of [their] powers * * * and the territory over which they shall be exercised rests in the absolute

discretion of the State." Hunter v. City of Pittsburg, 207 U.S. 161, 178 (1907).

23. For years black children in the Carver School District were assigned to black schools in the inner city because no white suburban district (or white school in the city) would take the children.

24. These findings are made on the basis of the present record and are subject to modification based on evidence which may be developed once the specific problems of actual desegregation are faced in the planning process.

25. See, Kelley, et al. v. Metropolitan Bd. of Educ., CCA 6, Nos. 71-1778-79, page 22, slip opinion, May 30, 1972:

> "Perhaps the primary thing that the Swann case decided was that in devising plans to terminate such residual effects, it is appropriate for the school system and the District Judge to take note of the proportion of white and black students within the area* and seek as practical a plan as may be for ending white schools and black schools and substituting therefor schools which are representative of the area in which the students live."
>
> *The area referred to in this case is all of Davidson County, including the City of Nashville, which is included in the jurisdiction of defendant Metropolitan Board of Education.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RONALD BRADLEY, et al., **Plaintiffs** **WILLIAM G. MILLIKEN, et al.,** **Defendants** **and** **DETROIT FEDERATION OF TEACHERS, LOCAL 231, AMERICAN FEDERATION OF TEACHERS, AFL-CIO,** **Defendant-Intervenor** **and** **DENISE MAGDOWSKI, et al.,** **Defendants-Intervenor** **et al.**	**CIVIL ACTION N** **35257**

RULING ON DESEGREGATION AREA AND ORDER FOR DEVELOPMENT OF PLAN OF DESEGREGATION

On September 27, 1971 the court made its Ruling on Issue of Segregation, holding that illegal segregation exists in the public schools of the City of Detroit as a result of a course of conduct on the part of the State of Michigan and the Detroit Board of Education. Having found a constitutional violation as established, on October 4, 1971 the court directed the school board defendants, City and State, to develop and submit plans of desegregation, designed to achieve the greatest possible degree of actual desegregation, taking into account the practicali-

ties of the situation. The directive called for the submission of both a "Detroit-only" and a "Metropolitan" plan.

Plans for the desegregation of the Detroit schools were submitted by the Detroit Board of Education and by the plaintiffs. Following five days of hearings the court found that while plaintiffs' plan would accomplish more desegregation than now obtains in the system, or which would be achieved under either Plan A or C of the Detroit Board of Education submissions, none of the plans would result in the desegregation of the public schools of the Detroit school district. The court, in its findings of fact and conclusions of law, concluded that "relief of segregation in the Detroit public schools cannot be accomplished within the corporate geographical limits of the city," and that it had the authority and the duty to look beyond such limits for a solution to the illegal segregation in the Detroit public schools. Accordingly, the court ruled, it had to consider a metropolitan remedy for segregation.

The parties submitted a number of plans for metropolitan desegregation. The State Board of Education submitted six - without recommendation, and without indicating any preference. With the exception of one of these, none could be considered as designed to accomplish desegregation. On the other hand the proposals of intervening defendant Magdowski, et al., the Detroit Board of Education and the plaintiffs were all good faith efforts to accomplish desegregation in the Detroit metropolitan area. The three plans submitted by these parties have many similarities, and all of them propose to incorporate, geographically, most—and in one instance, all—of the three-county area of Wayne, Oakland and Macomb.

The hearing on the proposals have set the framework, and have articulated the criteria and considerations, for developing and evaluating an effective plan of metropolitan desegregation. None of the submissions represent a complete plan for the effective and equitable desegregation of the metropolitan area, capable of implementation in its present form. The court will therefore draw upon the resources of the parties to devise, pursuant to its direction, a constitutional plan of desegregation of the Detroit public schools.

Based on the entire record herein, the previous oral and written rulings and orders of this court, and the Findings of Fact and Conclusions of Law filed herewith, IT IS ORDERED:

I.

A. As a panel charged with the responsibility of preparing and submitting an effective desegregation plan in accordance with the provisions of this order, the court appoints the following:

1. A designee of the State Superintendent of Public Instruction;*
2. Harold Wagner, Supervisor of the Transportation Unit in the Safety and Traffic Education Program of the State Department of Education;
3. Merle Henrickson, Detroit Board of Education;
4. Aubrey McCutcheon, Detroit Board of Education;
5. Freeman Flynn, Detroit Board of Education;
6. Gordon Foster, expert for plaintiffs;
7. Richard Morshead, representing defendant Magdowski, et al.;
8. A designee of the newly intervening defendants;*
9. Rita Scott, of the Michigan Civil Rights Commission.

Should any designated member of this panel be unable to serve, the other members of the panel shall elect any necessary replacements, upon notice to the court and the parties. In the

---

*The designees of the State Superintendent of Public Instruction and newly intervening defendants shall be communicated to the court within seven days of the entry of this order. In the event the newly intervening defendants cannot agree upon a designee, they may each submit a nominee within seven days from the entry of this order, and the court shall select one of the nominees as representative of said defendants.

absence of objections within five days of the notice, and pending a final ruling, such designated replacement shall act as a member of the panel.

B. As soon a possible, but in no event later than 45 days after the issuance of this order, the panel is to develop a plan for the assignment of pupils as set forth below in order to provide the maximum actual desegregation, and shall develop as well a plan for the transportation of pupils, for implementation for all grades, schools and clusters in the desegregation area. Insofar as required by the circumstances, which are to be detailed in particular, the panel may recommend immediate implementation of an interim desegregation plan for grades K-6, K-8 or K-9 in all or in as many clusters as practicable, with complete and final desegregation to proceed in no event later than the fall 1973 term. In its transportation plan the panel shall, to meet the needs of the proposed pupil assignment plan, make recommendations, including the shortest possible timetable, for acquiring sufficient additional transportation facilities for any interim or final plan of desegregation. Such recommendations shall be filed forthwith and in no event later than 45 days after the entry of this order. Should it develop that some additional transportation equipment is needed for an interim plan, the panel shall make recommendations for such acquisition within 20 days of this order.

C. The parties, their agents, employees, successors. [SIC] and all others having actual notice of this order shall cooperate fully with the panel in their assigned mission, including, but not limited to, the provision of data and reasonable full and part-time staff assistance as requested by the panel. The State defendants shall provide support, accreditation, funds, and otherwise take all actions necessary to insure that local officials and employees cooperate fully with the panel. All reasonable costs incurred by the panel shall be borne by the State defendants; provided, however, that staff assistance or other services provided by any school district, its employees or agents, shall be without charge, and the cost thereof shall be borne by such school district.

II.

A. Pupil reassignment to accomplish desegregation of the Detroit public schools is required within the geographical area which may be described as encompassing the following school districts (see Exhibit P.M. 12), and hereinafter referred to as the "desegregation area":

Lakeshore	Birmingham	Fairlane
Lakeview	Hazel Park	Garden City
Roseville	Highland Park	North Dearborn Heights
South Lake	Royal Oak	Cherry Hill
East Detroit	Berkley	Inkster
Grosse Pointe	Ferndale	Wayne
Centerline	Southfield	Westwood
Fitzgerald	Bloomfield Hills	Ecorse
Van Dyke	Oak Park	Romulus
Fraser	Redford Union	Taylor
Harper Woods	West Bloomfield	River Rouge
Warren	Clarenceville	Riverview
Warren Woods	Farmington	Wyandotte
Clawson	Livonia	Allen Park
Hamtramck	South Redford	Lincoln Park
Lamphere	Crestwood	Melvindale
Madison Heights	Dearborn	Southgate
Troy	Dearborn Heights	Detroit

Provided, however, that if in the actual assignment of pupils it appears necessary and feasible to achieve effective and complete racial desegregation to reassign pupils of another district or other districts, the desegregation panel may, upon notice to the parties, apply to the Court for an appropriate modification of this order.

B. Within the limitations of reasonable travel time and distance factors, pupil reassignments shall be effected within the clusters described in Exhibit P.M. 12 so as to achieve the greatest degree of actual desegregation to the end that, upon implementation, no school, grade or classroom by substantially

disproportionate to the overall pupil racial composition. The panel may, upon notice to the parties, recommend reorganization of clusters within the desegregation area in order to minimize administrative inconvenience, or time and/or numbers of pupils requiring transportation.

C. Appropriate and safe transportation arrangements shall be made available without cost to all pupils assigned to schools deemed by the panel to be other than "walk-in" schools.

D. Consistent with the requirements of maximum actual desegregation, every effort should be made to minimize the numbers of pupils to be reassigned and requiring transportation, the time pupils spend in transit, and the number and cost of new transportation facilities to be acquired by utilizing such techniques as clustering, the "skip" technique, island zoning, reasonable staggering of school hours, and maximization of use of existing transportation facilities, including buses owned or leased by school districts and buses operated by public transit authorities and private charter companies. The panel shall develop appropriate recommendations for limiting transfers which affect the desegregation of particular schools.

E. Transportation and pupil assignment shall, to the extent consistent with maximum feasible desegregation, be a two-way process with both black and white pupils sharing the responsibility for transportation requirements at all grade levels. In the determination of the utilization of existing, and the construction of new, facilities, care shall be taken to randomize the location of particular grade levels.

F. Faculty and staff shall be reassigned, in keeping with pupil desegregation, so as to prevent the creation or continuation of the identification of schools by reference to past racial composition, or the continuation of substantially disproportionate racial composition of the faculty and staffs, of the schools in the desegregation area. The faculty and staffs assigned to the schools within the desegregation area shall be substantially desegregated, bearing in mind, however, that the desideratum is the

balance of faculty and staff by qualifications for subject and grade level, and then by race, experience and sex. In the context of the evidence in this case, it is appropriate to require assignment of no less than 10% black faculty and staff at each school, and where there is more than one building administrator, every effort should be made to assign a bi-racial administrative team.

G. In the hiring, assignment, promotion, demotion, and dismissal of faculty and staff, racially non-discriminatory criteria must be developed and used; provided, however, there shall be no reduction in efforts to increase minority group representation among faculty and staff in the desegregation area. Affirmative action shall be taken to increase minority employment in all levels of teaching and administration.

H. The restructuring of school facility utilization necessitated by pupil reassignments should produce schools of substantially like quality, facilities, extra-curricular activities and staffs; and the utilization of existing school capacity through the desegregation area shall be made on the basis of uniform criteria.

I. The State Board of Education and the State Superintendent of Education shall with respect to all school construction and expansion, "consider the factor of racial balance along with other educational considerations in making decisions about new school sites, expansion of present facilities * * * "; and shall, within the desegregation area disapprove all proposals for new construction or expansion of existing facilities when "housing patterns in an area would result in a school largely segregated on racial * * * lines," all in accordance with the 1966 directive issued by the State Board of Education to local school boards and the State Board's "School Plant Planning Handbook" (see Ruling on Issue of segregation, p. 13.).

J. Pending further orders of the court, existing school district and regional boundaries and school governance arrangements will be maintained and continued, except to the extent necessary to effect pupil and faculty desegregation as set forth herein; provided, however, that existing administrative, finan-

cial, contractual, property and governance arrangements shall be examined, and recommendations for their temporary and permanent retention or modification shall be made, in light of the need to operate an effectively desegregated system of schools.

K. At each school within the desegregated area provision shall be made to insure that the curriculum, activities, and conduct standards respect the diversity of students from differing ethnic backgrounds and the dignity and safety of each individual, students, faculty, staff and parents.

L. The defendants shall, to insure the effective desegregation of the schools in the desegregation area, take immediate action including, but not limited to, the establishment or expansion of in-service training of faculty and staff, create bi-racial committees, employ black counselors, and require be-racial and non-discriminatory extra-curricular activities.

III

The State Superintendent of Public Instruction, with the assistance of the other state defendants, shall examine, and make recommendations, consistent with the principles established above, for appropriate interim and final arrangements for the (1) financial, (2) administrative and school governance, and (3) contractual arrangements for the operation of the schools within the desegregation area, including steps for unifying, or otherwise making uniform the personnel policies, procedures, contracts, and property arrangements of the various school districts.

Within 15 days of the entry of this order, the Superintendent shall advise the court and the parties of his progress in preparing such recommendations by filing a written report with the court and serving it on the parties. In not later than 45 days after the entry of this order, the Superintendent shall file with the court his recommendations for appropriate interim and final relief in these respects.

In his examination and recommendations, the Superintendent, consistent with the rulings and orders of this court,

may be guided, but not limited, by existing state law; where state law provides a convenient and adequate framework for interim or ultimate relief, it should be followed, where state law either is silent or conflicts with what is necessary to achieve the objectives of this order, the Superintendent shall independently recommend what he deems necessary. In particular, the Superintendent shall examine and choose one appropriate interim arrangement to oversee the immediate implementation of a plan of desegregation.

IV.

Each party may file appropriate plans or proposals for inclusion in any final order which may issue in this cause. The intent of this order is to permit all the parties to proceed apace with the task before us: fashioning an effective plan for the desegregation of the Detroit public schools.

Fifteen days after the filing of the reports required herein, hearings will begin on any proposal to modify any interim plan prepared by the panel and all other matters which may be incident to the adoption and implementation of any interim plan of desegregation submitted. The parties are placed on notice that they are to be prepared at that time to present their objections, alternatives and modifications. At such hearing the court will not consider objections to desegregation or proposals offered "instead" of desegregation.

Hearings on a final plan of desegregation will be set as circumstances require.

DATE: JUNE 14, 1972.

/s/

Stephen J. Roth
United States District Judge

PLAINTIFFS' PROPOSAL

SOURCE: 1970-71 State Racial Ethnic Census, Tri-County Area; October 1970 Detroit Racial Census.

District	*Total Students*	*Total Black Students*	*Percent Black Students*
Cluster 1			
Lakeshore	9,566	34	.4
Lakeview	7,859	0	.0
Roseville	14,426	205	1.4
South Lake	5,341	0	.0
Detroit Southeastern	15,990	12,725	79.6
	53,180	12,964	24.3
Cluster 2			
East Detroit	12,969	4	.0
Grosse Point	13,267	2	.0
Detroit King	10,495	10,107	96.3
	36,731	10,113	27.5
Cluster 3			
Centerline	6,716	6	.1
Fitzgerald	5,396	0	.0
Van Dyke	7,238	0	.0
Detroit Northeastern	10,496	9,399	89.5
Detroit Osborn	11,584	2,645	22.8
	41,430	12,050	29.1
Cluster 4			
Fraser	7,652	1	.0
Harper Woods	1,932	0	.0
Warren	31,815	50	.2
Warren Woods	9,231	1	.0
Detroit Denby	9,631	421	4.4
Detroit Finney	15,350	8,486	55.3
Detroit Kettering	17,866	16,339	91.4
	93,477	25,298	27.0
Cluster 5			
Clawson	5,088	0	.0
Hamtramck	2,843	816	28.7
Lamphere	5,851	1	.0

District	*Total Students*	*Total Black Students*	*Percent Black Students*
Cluster 5 (con't)			
Madison Heights	4,646	3	.1
Troy	6,435	6	.1
Detroit Pershing	14,690	9,436	64.2
	39,553	10,262	26.0
Cluster 6			
Birmingham	16,912	7	.0
Hazel Park	7,868	1	.0
Highland Park	7,708	6,556	85.1
Royal Oak	18,583	5	.0
Detroit Murray	9,564	7,042	73.6
	60,635	13,611	22.4
Cluster 7			
Berkley	8,196	9	.1
Ferndale	8,139	770	9.5
Southfield	16,333	8	.2
Detroit Central	13,491	13,448	99.7
	46,159	14,235	30.8
Cluster 8			
Bloomfield Hills	9,461	41	.4
Oak Park	5,524	553	10.1
Redford Union	9,382	2	.0
West Bloomfield	4,967	1	.0
Detroit Ford	10,661	2,680	25.1
Detroit Mumford	11,884	11,190	94.2
	51,870	14,472	27.8
Cluster 9			
Clarenceville	3,832	0	.0
Farmington	16,367	20	.1
Detroit Cooley	19,287	13,907	
less: Cadillac JHS & 1/5 Cooley	-4,250	-2,526	75.7
Detroit Redford	15,149	503	3.3
	50,385	11,904	23.6

District	*Total Students*	*Total Black Students*	*Percent Black Students*
Cluster 10			
Livonia	38,239	10	.0
South Redford	7,778	0	.0
Detroit Cody	15,534	1,666	10.7
Detroit Mackenzie	21,773	20,272	93.1
	83,324	21,948	26.3
Cluster 11			
Crestwood	5,436	0	.0
Dearborn	20,856	2	.0
Dearborn Heights	5,604	0	.0
Fairlane	1,121	0	.0
Garden City	13,669	0	.0
North Dearborn Heights	2,689	0	.0
Detroit Northwestern	14,876	14,771	99.3
	64,251	14,773	22.9
Cluster 12			
Cherry Hill	4,627	16	.3
Inkster	4,311	3,795	88.0
Wayne	23,218	30	.1
Westwood	4,961	1,980	39.9
Detroit Chadsey plus Cadillac JHS & 1/5 Cooley	5,998 4,250	2,053 2,526	44.7
	43,420	10,400	22.0
Cluster 13			
Ecorse	4,200	2,135	50.8
Romulus	5,801	958	16.5
Taylor	20,723	301	1.5
Detroit Western	11,728	5,337	45.6
	42,452	8,731	20.5

District	*Total Students*	*Total Black Students*	*Percent Black Students*
Cluster 14			
River Rouge	3,675	1,588	43.2
Riverview	3,790	1	.0
Wyandotte	8,278	2	.0
Detroit Southwestern	11,183	4,981	44.54
	26,926	6,572	24.4
Cluster 15			
Allen Park	6,324	11	.2
Lincoln Park	11,559	1	.0
Melvindale	5,476	1	.0
Southgate	9,300	1	.0
Detroit Northern	9,704	9,616	99.1
	42,363	9,630	22.7
TOTALS	780,090	197,313	25.3

INDEX

Introduction 1

Opinions and Orders Below 2

Jurisdiction, Question Presented, and Statutory Provisions Involved 2

Supplemental Statement of the Case 3

Further Reasons for Granting the Writ 3

Conclusion 8

CITATIONS

Cases:	Page
Alexander v *Holmes County Board of Education*, 396 US 19 (1969)	6
Bradley et al v *School Board of the City of Richmond*, 338 F Supp 67 (1972), reversed____F2d____(June 5, 1972, CA 4)	1,7,8
Goss v *Board of Education of the City of Knoxville*, 444 F2d 632 (CA 6, 1971)	6
Swann v *Charlotte-Mecklenburg Board of Education*, 402 US 1 (1971)	4,6

IN THE
SUPREME COURT FOR THE UNITED STATES
October Term 1971
No. 71-1463

WILLIAM G. MILLIKEN, Governor of the State of Michigan, et al,

Petitioners,

-vs.-

RONALD BRADLEY, et al,

Respondents.

SUPPLEMENTAL BRIEF OF RESPONDENTS SCHOOL DISTRICTS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

INTRODUCTION

Under date of June 5, 1972, Respondents filed with this Court the Brief of Respondents School Districts In Support Of Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit. Since the filing of said brief two highly significant and pertinent developments have occurred which Respondents believe should be considered by this Court in connection with the Petition For Writ Of Certiorari.

On June 5, 1972, the Court of Appeals for the Fourth Circuit, sitting *en banc*, ruled that a United States District Court could not compel the transfer and bussing of pupils between three (3) independent school districts for the purpose of achieving racial balance in the assignment of pupils to the public schools, absent invidious discrimination in the establishment or maintenance of the respective school districts, and in a 5 to 1 decision reversed the decision in *Bradley et al* v *School Board of the City of Richmond*, 338 F Supp 67 (1972), reversed ___F2d___(June 5, 1972, CA4).

On June 14, 1972, the District Court in the instant case issued a Ruling On Desegregation Area and Order for Development of Plan of Desegregation together with Findings of Fact and Conclusions of Law In Support of Ruling On Desegregation Area and Development of Plan. The Order of the District Court directly and immediately affects approximately 800,000 pupils in fifty-two (52) independent school districts located in three (3) different counties surrounding the City of Detroit. [1] Moreover, in a completely irrational rush to judgment, the District Court has directed that within a mere forty-five (45) days a plan must be developed for the transportation and assignment of students for all schools and all grades in fifty-two (52) school districts.

OPINIONS AND ORDERS BELOW

The Opinions issued by the District Court prior to June 14, 1972, are set forth in the appendix to the Petition For Writ of Certiorari previously filed with the Court and reference thereto is made in Respondents' initial brief filed herein.

As noted above, the District Court on June 14, 1972, issued (i) Ruling On Desegregation Area and Order for Development of Plan of Desegregation [2] (hereinafter called "Ruling and Order), and (ii) Findings of Fact and Conclusions of Law In Support of Ruling On Desegregation Area and Development of Plan [3] (hereinafter called "Findings and Conclusions").

JURISDICTION, QUESTION PRESENTED, AND STATUTORY PROVISIONS INVOLVED.

The statements as to Jurisdiction, Question Presented and Statutory Provisions involved are set forth at pages 1 through 3 of the Brief of Respondents previously filed with the Court.

[1] Although there are fifty-three (53) school districts named in the Ruling and Order (Supplemental Joint Appendix, page 43aa), two of the districts, Dearborn and Fairlane, have merged into one district.

[2] Supplemental Joint Appendix, page 39aa.

[3] Supplemental Joint Appendix, page 1aa.

SUPPLEMENTAL STATEMENT OF THE CASE.

In addition to the matters set forth in Respondents initial Brief to this Court. Respondents incorporate herein by reference the Ruling and Order and Findings and Conclusions issued by the District Court on June 14, 1972, as a supplemental statement of the case.[4]

FURTHER REASONS FOR GRANTING THE WRIT

In accord with Rules 24(5) and 41(5) of the Supreme Court Rules, the undersigned Respondents School Districts submit herein certain cogent matters which have intervened subsequent to the preparation and filing of their initial Brief In Support of Petition for Certiorari.

On June 14, 1972, the District Court issued a Ruling and Order directing that a plan of desegregation be implemented effecting a racial balance in all grades and schools in at least fifty-two (52) geographically and politically independent school districts.[5] The Order of the District Court is unprecedented not only in terms of its scope but also in the fact that there is no claim or judicial finding that any school district, except the City of Detroit, has been established or maintained so as to exclude or separate pupils on the basis of race. The District Court candidly admits that –

> ". . . . It should be noted that the court has taken no proofs with respect to the establishment of the boundaries of the 86 public school districts in the counties of Wayne, Oakland and Macomb, nor on the issue of whether, with the exclusion of the city of Detroit school district, such

[4] Ibid.

[5] Supplemental Appendix, pages 42aa and 43aa.

> school districts have committed acts of de jure segregation."[6]

The District Court has apparently thus concluded that its remedial powers are as broad as its own conception of desirable social reform without regard to any findings of impairment of constitutional rights. The remedy decreed by the District Court cannot be reconciled with this Court's pronouncement in *Swann* v *Charlotte-Mecklenburg Board of Education*, 402 US 1, 16 (1971), as follows:

> ". . . . it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation . . . . As with any equity case, the nature of the violation determines the scope of the remedy . . . ."

The nature of the violation found by the District Court is that a single, solitary school district, the City of Detroit, failed to maintain a unitary school system and that such action was countenanced by executive officers of the State of Michigan. There is admittedly no claim that the asserted unconstitutional actions relative to the Detroit school system in any way permeated any one of the fifty-two (52) school districts selected by the District Court for inclusion in its remedy. Here, the scope of the remedy is predicated solely upon judicial inventiveness.

The Ruling and Order of the District Court is utterly incredible and patently demonstrates the imperative public importance of this case and the compelling need for this Court to exercise its jurisdiction without awaiting an intermediate ruling from the Court of Appeals. In this regard, the Court's attention is directed hereinafter to just a few of the District Court's directives which portend major disruptive consequences to fifty-two (52) school districts and approximately 800,000 children and their parents.

[6] Supplemental Appendix, pages 1aa-2aa.

The City of Detroit school district embraces 276,934 pupils (Supplemental Joint Appendix, pages 49aa-52aa). The fifty-two (52) suburban school districts included in the District Court's desegregation plan have 503,178 pupils (Supplemental Joint Appendix, pages 49aa-52aa). The District Court created a nine (9) member panel to prepare a plan of desegregation, which panel includes four (4) persons associated with the City of Detroit School District and only one (1) person to represent the other fifty-two (52) school districts and 503,178 pupils to be affected by such plan (Supplemental Joint Appendix, page 41aa).

This case was commenced in August, 1970, and has been before the District Court for almost two (2) years. The trial on the merits was limited to the issue of whether the City of Detroit school district had failed to maintain a unitary school system. The initial ruling of the Court found only that the City of Detroit school system was a *de jure* segregated school system (Appendix to Petition For Writ of Certiorari, pages 1a-27a). The Respondents School Districts intervened in the case on March 15, 1972, and nineteen (19) of the school districts subjected to the District Court's ruling have never been party to this case in any capacity. Despite the foregoing facts, the District Court has directed that within forty-five (45) days from the date of its Ruling and Order, a desegregation plan, including a transportation plan, must be finalized (Supplemental Joint Appendix, page 42aa) and may be implemented "now, i.e. . . . for the 1972 fall term" (Supplemental Joint Appendix, page 24aa). Moreover, the District Court has frankly conceded that there is no ruling from this Court on the issue of whether independent school districts, with respect to which there are no findings of acts of segregation, may be included in a desegregation remedy (Appendix to Petition For Writ Of Certiorari, page 34a). The following statement of the Court of Appeals for the Sixth Circuit is apropos to the instant case and emphasizes the urgent need for this Court to review this case now.

> "Therefore, if it has taken the federal judiciary of this country 17 years to come up with final answers, it would

be judicially arrogant for us to tell the school authorities . . . to get the job done in the few months that will be available before the opening of the 1971 fall session . . .

"The hope or dream, that one day we will have become a people without any motivation born of our different racial beginnings will have a better chance of fulfillment if patience accompanies our endeavors. Strident and truculent judicial commands could indeed exacerbate what may now remain of racial bias and prejudice." *Goss* v *Board of Education of the City of Knoxville*, 444 F2d 632, 639-640 (CA 6, 1971).

The situation here involved is not like that posed in *Alexander* v *Holmes County Board of Education*, 396 US 19 (1969) where the Court decreed that continued operation of racially segregated schools must be terminated "at once" rather than with "all deliberate speed". Fifty-two (52) of the school districts here involved have not even been afforded a judicial hearing and there is no finding that they have failed to maintain a unitary school system or that the State of Michigan has fostered or maintained a dual school system.

In *Swann* v *Charlotte- Mecklenburg Board of Education*, 402 US 1 (1971) this Court noted that the constitutional duty to desegregate and maintain a unitary school system does not require racial balancing or mixing, stating:

". . . If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. . . ." *Swann, supra*, at page 24.

In the instant case the District Court, after finding the City of Detroit School system to be *de jure* segregated, arbitrarily selected fifty-two (52) independent school districts to be included in a desegregation plan calling for a racial balance relatively proportionate to the overall pupil racial composition in the districts involved.

"Within the limitations of reasonable travel time and distance factors, pupil reassignments shall be effected within the clusters described in Exhibit P.M. 12[7] so as to achieve the greatest degree of actual desegregation *to the end that, upon implementation, no school, grade, or classroom by [be] substantially disproportionate to the overall racial composition.* . . ." Supplemental Joint Appendix, pages 43aa-44aa. [Emphasis added.]

The Order of the District Court portends the reassignment of pupils between the fifty-three (53) school districts for the 1972 fall term (Supplemental Joint Appendix, page 24aa), less than 90 days from the date of this brief. It is respectfully submitted that the unprecedented remedy here involved, which is principally founded upon the judicial inventiveness of one man, should be reviewed by this Court now.

Since the filing of Respondents' initial brief in this case, the Court of Appeals for the Fourth Circuit reversed the District Court's decision in *Bradley et al* v *School Board of the City of Richmond*, 338 F Supp 67 (1972), ___ F2d ___ (CA 4, June 5, 1972) calling for the forced assignment of pupils between three (3) school districts in order to effect a racial balance in the public schools. The District Court in this case previously placed strong reliance on the lower court's opinion in *Bradley* v *Richmond* (Appendix to Petition For Writ Of Certiorari, page 41a-42a).

The Court of Appeals in *Bradley* v *Richmond, supra*, stated that where geographically and politically independent school districts have not been established or maintained with the intent of circumventing any federally protected right, a State's right to structure its own internal government is absolute. Here the District Court has conceded that there is no evidence that the school districts embraced within its Order were established to circumvent any federally protected right and no evidence that any of the fifty-three (53) school districts,

[7] Supplemental Joint Appendix, pages 48aa-52aa.

except Detroit, have defaulted in their constitutional obligation to maintain a unitary school system (Supplemental Joint Appendix, pages 1aa-2aa).

The underlying premise for the Order of the District Court is its determination that even if the City of Detroit school district was operated on a unitary basis, the student population would be predominantly black and therefore the Court is empowered to use its remedial powers to effect a racial balance. The Fourth Circuit Court of Appeals expressly rejected such rationale, stating:

> "... there is no right to a racial balance within even a single school district, *Swann* v *Charlotte-Mecklenburg Board of Education*, supra, at 24, but only a right to attend a unitary school system." *Bradley* v *Richmond*,____ F2d____(CA 4, June 5, 1972).

The matter of the scope of judicial remedy in school desegregation cases is one of national concern. The public is acutely aware of the varying Court decisions in this area and the divergent and conflicting decisions of the lower courts have created much confusion and engendered tremendous emotional reactions from all segments of the public. The decision of the Court of Appeals in *Bradley* v *Richmond, supra,* is diametrically opposed to the Ruling and Order of the District Court in the instant case.

Our democratic form of government is founded upon obedience to the rule of law. But what is the rule of law in cases such as the instant one? Only a decision by this Court will resolve the question. The magnitude of such question and its impact upon the lives of millions of children and parents cries out for an immediate review and determination by this Court.

CONCLUSION

For the reasons hereinbefore set forth, and those explicated in Respondents' initial brief, this Court should grant the

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit, to the end that immediate and final direction may be had with respect to the appropriate scope of judicial remedy in school desegregation cases.

Respectfully submitted,

BUTZEL, LONG, GUST, KLEIN & VAN ZILE
John B. Weaver
Robert M. Vercruysse,
Of Counsel

HILL, LEWIS, ADAMS, GOODRICH & TAIT
Robert B. Webster,
Of Counsel

CONDIT AND MC GARRY, P.C.
Richard P. Condit,
Of Counsel

HARTMAN, BEIER, HOWLETT, MC CONNELL & GOOGASIAN
Kenneth B. McConnell,
Of Counsel

WILLIAM M. SAXTON
1881 First National Building
Detroit, Michigan 48226

Counsel for Respondents Allen Park Public Schools, et al, Southfield Public Schools and School District of the City of Royal Oak

DOUGLAS H. WEST
3700 Penobscot Building
Detroit, Michigan 48226

Counsel for Respondent Grosse Pointe Public Schools

Dated: June 21, 1972

Supreme Court, U. S.
FILED
JUN 22 1972
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term 1971

No. 71-1463

WILLIAM G. MILLIKEN Governor of the State of Michigan, et al.,

Petitioners,

vs.

RONALD BRADLEY, et al.,

Respondents.

REPLY AND SUPPLEMENTAL BRIEF

FRANK J. KELLEY
Attorney General

Robert A. Derengoski
Solicitor General

Eugene Krasicky
Assistant Attorney General
Attorneys for Petitioners

Business Address:
Law Building
525 West Ottawa Street
Lansing, Michigan 48913

PRINTED BY SPEAKER-HINES AND THOMAS, INC., LANSING, MICHIGAN — 1972

TABLE OF CONTENTS

Introduction 1

Additional Reasons for the Grant of Certiorari 1

Relief 6

AUTHORITIES CITED

Swann v. Charlotte-Mecklenburg Board of Education, 402 US 1, 16 and 24 (1971) 4

Const 1963, Art IV, Sec. 30 5

Art IX, Sec. 17 5

In The

SUPREME COURT OF THE UNITED STATES

October Term 1971

No. 71-1463

WILLIAM G. MILLIKEN Governor of the State of Michigan, et al.,

Petitioners,

vs.

RONALD BRADLEY, et al.,

Respondents.

REPLY AND SUPPLEMENTAL BRIEF

INTRODUCTION

The petitioners believe arguments raised in the brief in opposition to the petition for certiorari have been eroded by subsequent events and, therefore, it is petitioners' duty to bring these developments to the attention of the Court.

ADDITIONAL REASONS FOR THE GRANT OF CERTIORARI

I.

On June 14, 1972 the district court issued its "FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF RULING ON DESEGREGATION AREA AND DEVELOPMENT OF PLAN" and entered its order entitled

"RULING ON DESEGREGATION AREA AND ORDER FOR DEVELOPMENT OF PLAN OF DESEGREGATION." These documents are contained in the supplemental joint appendix filed by petitioners and respondent intervening school districts. References herein are references to the pages of the supplemental joint appendix unless otherwise indicated. Again the orders are couched in "non-final" terms but set in motion events which would prevent effective review of same until the entire controversy has become a fait accompli.

We believe the district court is in good faith in its attempt to achieve integration of the Detroit school system. However, we vigorously assert that the procedures and methods employed by the Court are in derogation of existing law and that there is no basis for decreeing relief in the manner and to the enormous extent contemplated by the district court.

II.

The order entered on June 14, 1972 effectively compels the implementation of a massive metropolitan busing remedy prior to any appellate review on the questions of de jure segregation and the propriety of a metropolitan remedy. This order clearly puts to rest the contentions of plaintiffs-respondents concerning the lack, to date, of any significant decrees by the district court and petitioners ability to seek a stay and timely appellate review prior to implementation of the "final" remedial order of the district court.

The grave error of the district court is related by the court itself when in the second sentence of its opinion the court says:

> ". . . It should be noted that the court has taken no proofs with respect to the establishment of the

boundaries of the 86 public school districts in the counties of Wayne, Oakland and Macomb, nor on the issue of whether, with the exclusion of the city of Detroit school district, such school districts have committed acts of de jure segregation." (1aa, 2aa)

Yet, the "desegregation area" chosen by the court includes Detroit and 52 other school districts. Moreover, 18 of these school districts are not even parties to the litigation. It is respectfully submitted that the equitable powers of the district court do not reach these 18 school districts.

The district court's order plainly requires, within the judicially chosen "desegregation area" of 53 school districts, that at a minimum, a desegregation plan be prepared and implemented for the fall 1972 term including grades K-6, K-8, or K-9 in all or in as many clusters as practicable. This will occur less than 90 days from the date hereof. Complete and final desegregation must be accomplished no later than the fall 1973 term. Thus, for the fall 1972 term, there will be an "interim plan" with a "final plan" to be included in a subsequent "final order." (42aa, 43aa, 47aa). Petitioners are compelled to assert that the district court's piecemeal relief process will make large scale metropolitan busing an accomplished fact prior to appellate review.

As to faculty and staff, the district court found no de jure segregation in the Detroit public schools on this issue in its "Ruling on Issue of Segregation" on September 27, 1971. In fact, at that time the court praised the exemplary conduct of the Detroit school board and the intervening defendant union in the area of faculty and staff (14a-19a of petitioners' original appendix). Yet, in its remedial injunctive order of June 14, 1972 the court decreed:

". . . In the context of the evidence in this case, it is

appropriate to require assignment of no less than 10% black faculty and staff at each school, and where there is more than one building administrator, every effort should be made to assign a bi-racial administrative team." (45aa).

Patently, this demonstrates that, contrary to the explicit commands of this court in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 US 1, 16 and 24 (1971), the district court, in the absence of any finding of a constitutional violation as to faculty and staff, has decreed an impermissible fixed racial balance quota for each school within the 53 school districts. Based on judicial speculation of a desirable racial balance, many teachers in the metropolitan area will be required to teach in new schools and school districts in the fall irrespective of their presently existing contractual rights.

III.

The scope of the remedial injunctive order entered on June 14, 1972 also extends to racial balance in future school construction and expansion and modification of existing administrative, financial, contractual, property and governance arrangements as required to effectively operate a desegregated school system within the 53 school districts. (45aa, 46aa) The lower court has ordered the Superintendent of Public Instruction, with assistance from the other state defendants, to make recommendations to the court for interim and final arrangements in each of the areas of school district administration set forth above. (46aa, 47aa) In addition, the Superintendent of Public Instruction has been expressly ordered to recommend what he deems necessary to achieve the objectives of the court's order in these areas independently of what state law provides in each of these areas. (46aa, 47aa).

On the question of financing the metropolitan remedy, the district court has ruled that funds must either be raised or reallocated, where necessary, to secure plaintiffs' constitutional rights. (36aa). Further, the state defendants have been ordered to bear the costs of the nine member panel appointed by the court to design interim and final plans. (42aa). Simply put, the state defendants do not possess the power of the purse under Michigan law. The power to lawfully appropriate state funds under Michigan law is reposed in the Michigan Legislature. Const 1963, Art IV, Sec. 30:

> "The assent of two-thirds of the members elected to and serving in each house of the legislature shall be required for the appropriation of public money or property for local or private purposes."

Art IX, Sec. 17:

> "No money shall be paid out of the state treasury except in pursuance of appropriations made by law."

Petitioners have no authority to expend funds without legislative approval and the legislature is not a party to this cause. Thus, the district court has assumed the role of final arbiter over school district finance and state funds for 53 school districts.

The necessity of this Court's passing upon the three questions raised by the petition for certiorari are vividly illustrated by several aspects of the district court's most recent "non-final" opinion and order. This opinion and order are truly remarkable in terms of the slender foundation, indeed a foundation of sand, upon which the lower court has erected a 53 district metropolitan desegregation edifice covering all aspects of the educational process.

To conclude, the time has come for this Court to take jurisdiction of this cause and pass upon the three questions raised in the petition for certiorari. A metropolitan desegregation remedy involving the busing of hundreds of thousands of school children, the relocation of thousands of teachers, and the disruption of the educational programs of 53 separate districts, involving some 800,000 students must not be implemented prior to final appellate review by this Court. (See Exhibit A indicating areas affected by the district court orders.)

RELIEF

For the aforegoing reasons, a writ of certiorari should issue to review the judgment of the Sixth Circuit and this Court should assume jurisdiction to determine the three questions raised in the petition for certiorari prior to the implementation of the metropolitan remedy in this cause.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

ROBERT A. DERENGOSKI /s/
Robert A. Derengoski
Solicitor General

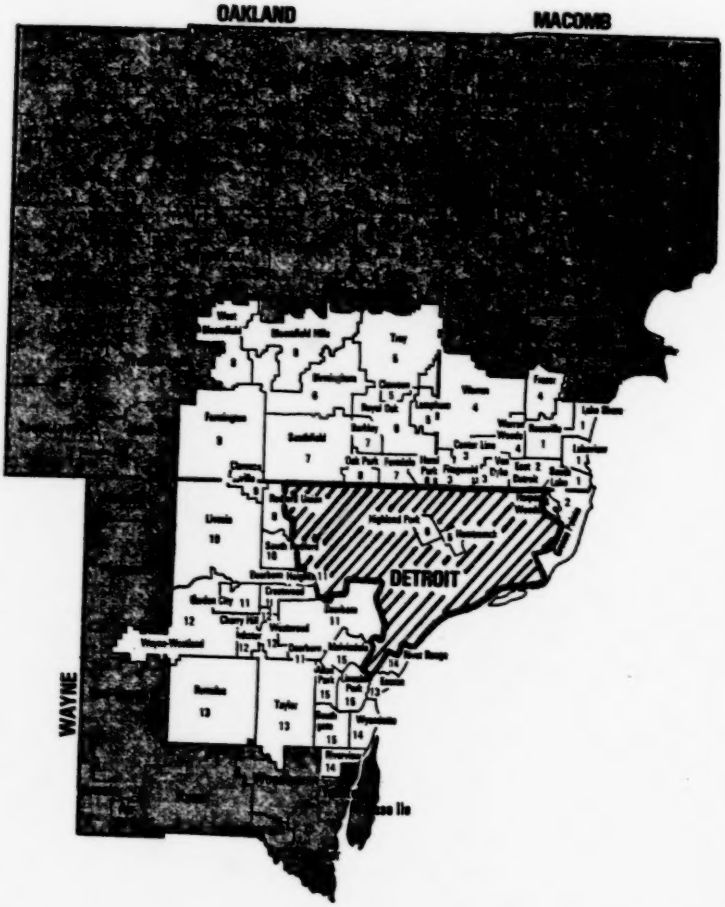
Eugene Krasicky
Assistant Attorney General

Attorneys for Petitioners

Business Address:
Law Building
525 West Ottawa Street
Lansing, Michigan 48913

Dated: June 16, 1972

EXHIBIT A



Note: Area designated by diagonal lines indicates present Detroit School District.
Area in white indicates school districts to be affected by Judge Roth's orders.

FILE COPY

SEP 21 1972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1463

WILLIAM J. MILLIKEN, *et al.*,

Petitioners,

vs.

RONALD BRADLEY, *et al.*

SUPPLEMENTAL BRIEF FOR RESPONDENTS BRADLEY, ET AL.

JACK GREENBERG
NORMAN J. CHACHKIN
10 Columbus Circle
New York, New York 10019

E. WINTHER McCROOM
3245 Woodburn Avenue
Cincinnati, Ohio 45207

BRUCE MILLER
LUCILLE WATTS
3246 Cadillac Towers
Detroit, Michigan

LOUIS R. LUCAS
WILLIAM E. CALDWELL
525 Commerce Title Bldg.
Memphis, Tennessee 38103

NATHANIEL R. JONES
1790 Broadway
New York, New York 10019

J. HAROLD FLANNERY
PAUL R. DIMOND
ROBERT PRESSMAN
38 Kirkland Street
Cambridge, Mass. 02138

Attorneys for Respondents
Ronald Bradley, et al.,
Plaintiffs Below

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1463

WILLIAM J. MILLIKEN, *et al.*,

Petitioners,

—VS.—

RONALD BRADLEY, *et al.*

SUPPLEMENTAL BRIEF FOR RESPONDENTS BRADLEY, ET AL.

Pursuant to Rule 24(5) of the Rules of the Supreme Court, respondents Bradley, et al. respectfully file this Supplemental Brief to advise the Court of proceedings in this cause before the district court and the United States Court of Appeals for the Sixth Circuit which have taken place since the filing, by respondents school districts on or about June 21, 1972, of a Supplemental Brief and Supplemental Joint Appendix in support of the Petition. In light of these proceedings the question properly presented by the Petition is now moot.

In our Brief in Opposition to Certiorari, pages 6-7, we noted that the question of appealability of the district court's September 27, 1971 opinion and order was likely to become moot prior to a decision on the merits by this Court even if certiorari were granted. We now can advise the Court that such issue is indeed moot at the present time, and there is no reason to grant the writ of certiorari in this case.

After entry of the district court's June 14, 1972 ruling and order, which is the subject of the Supplemental Brief and Joint Appendix filed last spring by other respondents, appeals were noted and various interlocutory proceedings transpired before the Sixth Circuit on matters of stays, mandamus and prohibition sought by various parties. On July 20, 1972, the district court entered an order pursuant to F.R.C.P. 54(b), directing entry of judgment as to certain claims, and pursuant to 28 U.S.C. § 1292(b), certifying the existence of controlling questions of law as to which substantial ground for difference of opinion existed, authorizing appeal of all its previous rulings (dated September 27, 1971, March 24, 1972, March 28, 1972, June 14, 1972 and July 11, 1972).[1] On the same day the Court of Appeals granted leave to appeal and stayed the July 11, 1972 district court order "and all orders of the district court concerned with pupil and faculty reassignment within the metropolitan area beyond the geographic jurisdiction of the Detroit Board of Education, and all other proceedings in the district court other than planning proceedings" pending appeal. (See Appendix A hereto).

The appeal was also expedited and scheduled for hearing on August 24, 1972; the parties submitted lengthy and thorough briefs on all issues, including those concerning the correctness of the September 27, 1971 district court order and opinion finding unlawful segregation of the Detroit public schools, as well as the subsequent orders of the district court concerned with devising a remedy for that constitutional violation. At the close of the argument on August 24, 1972, the Court of Appeals denied an oral motion to vacate its stay.

---

[1] On July 11, 1972, the district court entered an order directing the purchase of transportation equipment in order that capability to implement the Court's June 14 order might be available during the 1972-73 school year.

Thus the issue presented by the Petition for Writ of Certiorari is moot; petitioners have obtained their hearing before the Court of Appeals and all district court decrees which might affect the operation of the Detroit area public schools have been stayed pending the outcome of the appeals now under submission in the Sixth Circuit. Whatever reason might once have existed for reviewing the dismissal of the prior appeal by the Sixth Circuit, or the orders of the district court, the proper course at this time is to deny the Petition and permit the Court of Appeals to complete its consideration of the matter, which may render unnecessary any further proceedings before this Court on behalf of petitioners.

CONCLUSION

For the foregoing reasons, respondents Bradley et al. respectfully pray that the writ be denied.

Respectfully submitted,

JACK GREENBERG
NORMAN J. CHACHKIN
10 Columbus Circle
New York, New York 10019

E. WINTHER MCCROOM
3245 Woodburn Avenue
Cincinnati, Ohio 45207

BRUCE MILLER
LUCILLE WATTS
3246 Cadillac Towers
Detroit, Michigan

LOUIS R. LUCAS
WILLIAM E. CALDWELL
525 Commerce Title Bldg.
Memphis, Tennessee 38103

NATHANIEL R. JONES
1790 Broadway
New York, New York 10019

J. HAROLD FLANNERY
PAUL R. DIMOND
ROBERT PRESSMAN
38 Kirkland Street
Cambridge, Mass. 02138

Attorneys for Respondents
Ronald Bradley, et al.,
Plaintiffs Below

APPENDIX A

#72-8002

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

RONALD BRADLEY, *et al.*,

Plaintiffs-Appellants,

—v.—

WILLIAM G. MILLIKEN, *et al.*,

Defendants-Appellants,

and

DETROIT FEDERATION OF TEACHERS LOCAL 231, AMERICAN FEDERATION OF TEACHERS, AFL-CIO,

Defendant-Intervenor,

and

DENISE MAGDOWSKI, *et al.*,

Defendants-Intervenors.

Before:

PHILLIPS, *Chief Judge,* EDWARDS and PECK, *Circuit Judges.*

ORDER

The District Court has certified that certain orders entered by him in this case involve controlling questions of law, as provided by 28 U. S. C. §1292(b), and has made a determination of finality under Rule 54(b), Fed. R. Civ. P.

Appendix A

This court concludes that among the substantial questions presented there is at least one difficult issue of first impression which never has been decided by this court or the Supreme Court. In so holding we imply nothing as to our view of the merits of this appeal. We conclude that an immediate appeal may materially advance the ultimate termination of the litigation. Accordingly, it is ORDERED that the motion for leave to appeal be and hereby is granted.

It is further ORDERED that the appeal in this case be advanced on the docket of this court and scheduled for hearing Thursday, August 24, 1972, at 9. a.m. The appendix and simultaneous briefs of all parties shall be filed not later than 25 days after the entry of this order. Reply briefs shall be filed not later than August 21, 1972. Typewritten appendix and briefs may be filed in lieu of printed briefs, together with ten legible copies produced by Xerox or similar process. An appendix must be filed. The court will not entertain a motion to hear the appeal on the original record.

The motion for stay pending appeal having been considered it is further ORDERED that the Order for Acquisition of Transportation, entered by the District Court on July 11, 1972, and all orders of the District Court concerned with pupil and faculty reassignment within the Metropolitan Area beyond the geographical jurisdiction of the Detroit Board of Education, and all other proceedings in the District Court other than planning proceedings, be stayed pending the hearing of this appeal on its merits and the disposition of the appeal by this court, or until further order of this court. This stay order does not apply to the studies and planning of the panel which has been appointed by the District Court in its order of June 14, 1972, which panel was charged with the duty of preparing interim and final plans of desegregation. Said panel is authorized to proceed with

its studies and planning during the disposition of this appeal, to the end that there will be no unnecessary delay in the implementation of the ultimate steps contemplated in the orders of the District Court in event the decision of the District Court is affirmed on appeal. Pending disposition of the appeal, the defendants and the School Districts involved shall supply administrative and staff assistance to the aforesaid panel upon its request. Until further order of this court, the reasonable costs incurred by the panel shall be paid as provided by the District Court's order of June 14, 1972.

Entered by order of the Court.

/s/ JAMES A. HIGGINS
Clerk